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## ADMIRALTY PRACTICE.

THE present number contains a report of the case of *The Taranto*, recently adjudicated in the United States district court. This case has attracted attention, partly on account of its novelty; but more especially, because it illustrates the salutary operation of the admiralty practice. For the details of the case, we refer to the report itself; but it may not be improper to recapitulate a few of the circumstances under which the peculiar process of the admiralty courts has been so successfully interposed. The libellants were members of a California company, who had invested their whole property in the vessel and outfits, which constituted the subject of their enterprise. They had never had possession or documents of title of this property, and this suit was brought to obtain them. As in most cases within the jurisdiction of the admiralty courts, the libellants had a concurrent remedy in the common law courts of this commonwealth. But in the present instance, from peculiar circumstances, it was entirely impracticable to bring an action at common law. The only form of action which would have secured possession is an action of *replevin*. But the imperative condition is attached to that process that previously to the service of the writ, the officer must receive a bond with sureties, in a penalty double the value of the property to be replevied, conditioned to prosecute to final judgment. In the case of *The*

*Taranto*, the whole property of the libellants was that of which they sought to recover possession. They had nothing else by a mortgage of which they might secure any friends who were disposed to become their sureties, and it was consequently impossible for them to avail themselves of this remedy. The court was open to be sure, but they could not afford to resort to it. Now we must not be understood to say this with the spirit of a demagogue. Far from it. It is indispensable to the theory of the action of replevin that such security should be demanded. If property is to be given up to parties claiming to be owners, without judicial action, the claimants ought clearly to give some security, that they will vindicate their title. The fault is not here. The great defect in the present administration of justice in the common law courts of Massachusetts is that there is no way by which a party can substantiate a title to property unlawfully withholden, except after a ruinous delay. Judging from daily experience, the owners of this vessel could not have hoped for judgment within less than a year from the time of the service of their writ, and this estimate is made upon the supposition that no mistake is found in the description of the parties, that no "newly discovered evidence" comes to light at the last moment; that the verdict is not against evidence (a contingency not wholly improbable); that all the material witnesses can readily be found, when the case is reached. For this delay they would be compensated by damages, computed upon the standard of six per cent. interest. It seems like reviving the torments of Tantalus to offer to an excited company of California gold-seekers, whose preparations have been completed, whose vessel is equipped and ready for sea, and who are only waiting for a clearance, the privilege of remaining upon the sterile soil of New England one year longer, of paying their own board, and of dancing attendance at the court house in order to secure six per cent. interest upon their money, while the brokers in State street are charging twelve.

Fortunately, their case is not quite so bad. By the summary process of the court of admiralty, their rights may be established, and their property recovered in the period of a few weeks. Mistakes of description, accidental non-joinder of a libellant, and other similar errors which would seem almost unavoidable with such a non-descript collection of parties as a joint-

stock California association, cannot defeat or defer the case, if they do not affect its true merits. Besides this, they are entitled to the sworn answer of the respondents, and to the testimony of witnesses whose recollection has not become treacherous by delay.

In the case of *The Taranto*, the libel was filed March 3d, the pleadings closed on the 7th, the trial commenced on the 9th, occupied three days, and two days after a decree was entered for the libellants, the value of the property claimed being nearly $20,000.

There are some persons who affect to think lightly of the procedure in the admiralty. It is not uncommon to hear allusions made to the very "slovenly practice" in the admiralty courts. In regard to the liberal system of practice which obtains in these courts, no defence is required. It is a system which is acknowledged, by all who are familiar with its operation, to subserve the true ends of justice. It is unincumbered by useless forms; but the formalities which it exacts may be clearly understood, and cannot be abused to defeat the true ends for which courts are established. Immense discretion is allowed to the judge, but we have yet to learn from the experience of England and America that it is a discretion which is apt to be abused. On the contrary, the increased discretion creates additional responsibility, and it is impossible to avoid that course which the true ends of justice require, by retreating behind conventionalisms and precedents.

It is sometimes argued by extreme conservatives that such a jurisdiction is unsafe, that too much power is given to the courts, and that its tendency is radical. This also is contradicted by experience. The history of those judges who have been most favorably inclined to the admiralty jurisdiction and of those courts where it has been administered most beneficially, points to a different result. During the violent convulsions in Europe which followed the first French revolution, and throughout the wild and reckless career of Napoleon, and at a time when the social organization of the whole world seemed in jeopardy, Sir William Scott presided in the English courts of admiralty. The prize law as at present administered is, in a great measure, the result of his labors. To him it is mainly indebted for its symmetry and completeness, and when Napoleon and Nelson are forgotten, the principles which he expounded will survive in

the unwritten law of distant times. But not only in the adjudication of prize-cases, but in the administration of all the various duties of the admiralty and maritime jurisdiction, was this great judge distinguished. His recorded decisions contained in the successive reports of Robinson, Edwards, and Dodson, now form the basis of that law which is administered in the maritime courts everywhere. In the course of adjudication, (it might almost be said of legislation, and legislation, too, not only for the British empire, but for the whole maritime world) he treated great questions with a boldness which Napoleon himself might have envied, and in a liberal spirit which would have done honor to Burke. In his silent retreat at Doctor's Commons, while all Europe was tottering, he published principles of human conduct, whose importance will not be lost sight of in contemplating the consequences of the military achievements and political revolutions of that eventful period. Yet was this great man eminently a conservative. Throughout his bold but firm career, he never lost his love of social order, nor his reverence for all that is worthy of reverence in the institutions of government. He was conservative, but not a bigot. He was loyal but not obsequious.

The same salutary influence of the admiralty practice may be traced in the career of its greatest American expounder, the late Mr. Justice Story. No judge ever went farther than he in maintaining the jurisdiction of the admiralty. No judge was ever more bold in his efforts to secure substantial justice to all who claimed its protection. Yet no judge was ever more true to the independence of the judiciary or the maintenance of the laws.

In regard to the rules of professional deportment enjoined upon those who practise in the admiralty courts, it may not be amiss to add a few words. It may be safely said that there is less room for mal-practice in these courts than in any other. According to the practice in the courts of this commonwealth, it is possible for the most outrageous wrongs to be committed in the most wanton manner. A writ of attachment may be purchased at a lawyer's office for a few dollars, upon the representation of a mere adventurer, by virtue of which the sheriff is required to attach property, it may be, of great amount, and oftentimes to interrupt the business and to destroy the credit of an upright

and innocent man. The only remedy is the tardy and uncertain process of an action for malicious prosecution. Not so in the admiralty. No warrant or other process *in rem* will be granted except upon a libel which has been sworn to, and after a hearing before the judge. Nor will any process either *in personam* or *in rem* be granted unless the libel be verified by oath. In addition to this, the libels must be countersigned by the proctor, who pledges himself by that act to have investigated the case, and to be satisfied of its merits. Should the result show neglect or wantonesss, the proctor may be condemned to pay the costs. The consequence is, that under the severe scrutiny of the court, it is impossible to evade the restrictions of the law.

There is a dignity about the admiralty court which is not universal in the courts of common law. It is not the place for inflammatory appeals, pert replies, angry retorts, and noisy declamation. It is not the place where any thing is to be gained by roughness and browbeating. On the contrary, a liberal spirit pervades the bar and the bench. It is impossible, of course, to speak generally of the administration of admiralty law throughout the union; but, as for the Massachusetts district, we think that all will bear witness to the superior attainments and incorruptible character of the judge who presides in its court. He possesses other qualifications, not less attractive. Courteous and dignified manners, and a proper regard for the rights and feelings of all who appear before him, have secured to him general and enduring respect.

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## Recent American Decisions.

*District Court of the United States, District of Massachusetts, March*, 1849.

THE TARANTO. — A. C. BRUCE AND OTHERS, Libellants, THOMAS H. SWASEY AND OTHERS, Respondents.

In a cause of title and possession. Jurisdiction of the admiralty in petitory suits, and nature of maritime liens.

THE libellants, sixty in number, were a joint-stock company, called "The Shawmut Mining and Trading Association," with

a capital of $18,000, in sixty shares of $300 each. They had appointed the respondents, T. H. Swasey & Co., their agents and treasurers, and had paid to them their subscriptions. The Messrs. Swasey purchased the brig Taranto with this money, and fitted her for sea, with stores for the use of the association for eighteen months. Just as the association was about to sail, the Messrs. Swasey presented their account, which made the association indebted to them about four thousand dollars above the capital stock. The association, on examination of this account, became dissatisfied with the conduct of their agents, and with the state of their accounts; the more so, on finding that they had got possession of, and destroyed the bond given by them to the association, for the faithful performance of their duty. The Messrs. Swasey having taken the bill of sale and custom-house documents in their own name and in that of J. M. Merrill, the master, who was in their interest, and having the possession of the vessel, with all the stores on board, refused to give them up, or permit the vessel to go to sea, unless their account was allowed and paid by the association.

The libel alleged that the libellants were the lawful owners of the brig Taranto, her tackle, apparel, and furniture, and of the sea stores on board, and entitled to the possession thereof. The prayer of the libel was in these words, after the prayer for process: "And that this honorable court would be pleased to decree that the libellants have a right to the title and possession of said brig Taranto, her tackle, apparel, and furniture, and to the sea stores now on board said brig, and that the title to the same be decreed to be vested in Nathaniel Adams, John T. Dingley, C. P. Danforth, C. T. Gill, and M. A. Thomas, lawful agents of the libellants, for the use of the libellants; and to decree that the possession of said brig, her tackle, apparel, and furniture, and of the sea stores now on board said brig, be delivered to the libellants, or to the said Adams, Dingley, Danforth, Gill, and Thomas, for the use of the libellants; and to decree that the said Thomas H. Swasey, Edward Swasey, and John M. Merrill, do deliver to the libellants, or to the said Adams, Dingley, Danforth, Gill, and Thomas, for the use of the libellants, the bill of sale, certificate of registry, enrolment, or license, and all other documents belonging to said vessel, in

their possession," ending with the prayer for general relief and for costs.

There were three sets of claimants. Thomas H. Swasey & Co., agents of the association, holders of the bill of sale and register of the vessel, claimed a lien upon them and the vessel for the amount of their account against the association. John M. Merrill, master of the vessel, claimed a lien for security against liabilities he might be under, as master, to persons who had furnished labor or materials for the vessel. Messrs. Thayer & Merrill, who had furnished provisions and ship chandlery to a large amount, claimed a lien for their account, under the statute of Massachusetts, 1848, ch. 290, which creates a lien on vessels in the home port, for labor, materials, provisions, or stores, furnished. They had also, before the filing of the libel, attached the vessel in a suit at common law, in the state court, against the Messrs. Swasey, for these provisions, and denied the right of this court to defeat the attachment.

The trial and arguments occupied several days; and more than thirty witnesses were examined on the merits.

*Richard H. Dana, Jr.*, for the libellants.

This court has jurisdiction to decree title as well as possession, and full power to pass upon litigated questions of title. *The Tilton*, (5 Mason, 465); Dunlap's Adm. Practice, 69, 296; Betts's Adm. Practice, 16; Rules of the Circuit Court, in Admiralty, xx.; 1 Kaufman's Mackeldy, (Modern Civil Law) § 193, n. It will take jurisdiction over the sea stores, as incidental and auxiliary to the vessel; as in cases of cargo and freight.

This court has jurisdiction, by a personal admonition, to require a respondent to deliver up documents of title, and revenue papers. Hall's Adm. Practice, 199.

The Messrs. Swasey, as ship's husbands, or as agents, have no lien, by the general maritime law. There was no contract for a lien, and their conduct has been such as to defeat any equitable claim for a lien which they may set up. John M. Merrill, as master, has no lien, by the general maritime law, and in his case, as in that of the Messrs. Swasey, there was neither a special contract for a lien, nor equities which might lead the court to decline taking the vessel from him.

As to the claim of Thayer & Merrill, if they have any lien, by the statute of Massachusetts, it cannot be affected by the decree prayed for, as the decree only affects title and possession, and the lien set up is irrespective of either title or possession. The decree could produce no other effect on the lien under the statute, than would be produced by a sale and delivery of title and possession, out of court. The prayer of Messrs. Thayer and Merrill to have their lien enforced is inadmissible. They are not in a position to enforce a lien, having simply come into court as respondents to a petitory libel, against which their lien is no defence. Also, they do not submit themselves to the jurisdiction of the court, but insist on the preservation of their attachment at the common law, which is inconsistent with the enforcement of their lien. Moreover, their attachment is a waiver of their lien.

The attachment of the vessel at common law, by Thayer & Merrill, is no obstacle to this decree. They have not proceeded *in rem*, against the vessel for which they have furnished supplies, nor against any particular fund. The common law knows no such process. They have attached the vessel simply as the property of the Messrs. Swasey, in the same manner that they would attach their house or furniture, and hold it by no other or better claim. As between Thayer & Merrill, as attaching creditors, and the libellants who claim the vessel as their own, the only question is, in whom is the property in the vessel. One of the objects of this suit is to contest the validity of the attachment, which can be contested as well in a petitory suit in Admirality, as in a suit of replevin at common law. Betts' Adm. Practice, 17. As to their attachment, Thayer & Merrill have no better claim than any other creditor of the Messrs. Swasey, who should attach the vessel for a demand arising either *ex contractu* or *ex delicto*. The common law attachment is founded solely on property, and has no relation to the subject matter of the suit, to the equities between the parties, or to the particular fund benefited or credited.

*Edward D. Sohier*, for the respondents, contended that, on the evidence, the Messrs. Swasey had a lien by special contract; and that, if the court was not satisfied of this, yet they had made advances and incurred liabilities for the benefit of the vessel, relying upon her as security, and the court, gov-

erned by equitable considerations, would not under such circumstances, take the vessel from them while their claims remained unsatisfied and unsecured. That the legal title, by the bill of sale, being in them, the court would not enforce a merely equitable title. *The Guardian*, (3 Robinson, 93); (Abbott on Shipping, 132); *Ohl* v. *Eagle Ins. Co.* (4 Mason, 390.)

As to Thayer & Merrill, he contended that their lien under the state law could be enforced in this proceeding. *The Robert Fulton*, (1 Payne, 620.)

Their attachment also, was valid, because the legal title to the vessel was in the Messrs. Swasey, and this court could not defeat the attachment which depends on the legal title, in favor of a merely equitable title. Moreover, the libellants, by permitting the Messrs. Swasey to have the bill of sale and custom house documents, in their own name, held them out to the world as owners, and could not now set up a title in themselves against third persons who had given credit to the Messrs. Swasey on the faith of their apparent ownership.

By the attachment, the vessel was in the custody of the law, and could not afterwards be taken by the marshal. He should have returned the fact that the vessel was attached, in the state court, and then this suit *in rem*, could not have gone forward. 1 Payne, *ut supra*.

*Dana*, in reply. The case of the Robert Fulton was a proceeding for the enforcement of a lien, and the respondents, having liens also, properly intervened to have their claims satisfied from the proceeds. But this is not a suit for the enforcement of a lien. Also, in that case, the appellants had proceeded *in rem*, under the local statute, and not by attachment. An attachment is no objection to a proceeding *in rem*, as in the case of seamen's wages, bottomry, salvage, &c.

JUDGE SPRAGUE, in delivering his opinion, said, in substance, that he was satisfied, upon the evidence, that the following was the true state of the facts:

The Messrs. Swasey were the originators of this enterprise, for the purpose of being made agents, and for the commissions and other profits of doing the business. They advertised for persons to join the company, prepared such a constitution as

they chose, which gave them the office of agent and treasurer, and fixed the capital stock at $15,000 in 50 shares of $300 each. They gave strong assurances to inquirers that they had made careful estimates, and that this sum was ample to buy, fit out, and provision the vessel for two years. These assurances were not fulfilled, and were made without sufficient foundation. On the faith of them, however, the requisite number of persons joined the company, a meeting was called, and the constitution adopted. As prepared by the Messrs. Swasey this constitution gave no security to the company for the fidelity of the agents, but an amendment was made, requiring of them a bond in $20,000 for the faithful discharge of their duties. This bond was given, with proper sureties. The Swaseys then announced to the company that it would require $3,000 more to pay all expenses; and gave the strongest assurances that this would be sufficient, and leave a handsome balance for contingencies; and said that they had then obtained all their bills of any consequence, and knew what the expenses would be. On the faith of these assurances, the company enlarged their number by creating ten new shares, which were subscribed for and mostly paid in. The bill of sale of the vessel was permitted by a vote of the company to stand in the name of Messrs. Swasey and of Capt. Merrill. On this point the evidence is complete and uncontradicted that the bill of sale was so left, merely as matter of convenience, and in reliance upon the bond which had been given, and without any view to its being security to the agents or master. At the time of this vote there was no idea that the company would or could be in debt to the Messrs. Swasey. Indeed, they had no authority to spend any thing beyond the amount of the capital stock. Between themselves and the association they were merely disbursing agents.

About the middle of February the Swaseys summoned the members to the city, and on the 21st, with the knowledge of the Swaseys, it was voted to sail on the 24th. The vessel was now loaded, the hatches down, the boats stowed, and every thing ready for sea. On the afternoon of the 22d, the Swaseys, for the first time, announced to the company, that it was in debt to them about $4000. I have no doubt from the evidence, that they knew the state of the accounts long before

this, and delayed the announcement intentionally until the company was placed under the disadvantage of being all assembled, most of them at a distance from their homes, and in the expectation of going immediately to sea. The company was dissatisfied, the more so on inquiry into the purchases made by the Swaseys; and, on looking for the bond, it was ascertained that Mr. T. H. Swasey had obtained it, in some manner unknown to the company, and destroyed it. This act his counsel, very properly, has not attempted to defend.

On inquiry, it appeared that the Swaseys had charged the company with the face of the bills of goods purchased by them, of Thayer & Merrill, when in fact there had been (as to a part of the bill) a discount of three per cent.; and $100 was discounted from the price of the vessel, which was not communicated to the company.

I am satisfied that there was no contract between the Swaseys and the association, by which they have any lien upon the ship or her stores. As to a right in general equity which an agent has to retain property against his principal, on which he has made advances, it is enough to say that the conduct of the Swaseys has not been such as to entitle them to enforce any such equities in this court against the association. As against these respondents, therefore, the decree must be for the libellants.

As to to the claim of Captain Merrill, he has no lien by contract, nor by the general maritime law, and there is no evidence that he has incurred any liabilities. If he has done so, it is without authority from the company.

The respondents, Thayer & Merrill, claim a lien for their provisions and chandlery advanced, under the Massachusetts statute, 1848, ch. 290. This statute creates a lien on a vessel, in the ports of the state, under certain limitations, in favor of parties who have furnished labor, materials, stores, or provisions. It provides no means of enforcing the lien by any process from the state courts, and parties are accordingly to pursue their remedy in admiralty. These respondents have not done so. It is not necessary to decide whether they had a lien, or whether it is waived, for they are not properly before the court for the enforcement of a lien. They are not libellants; no notice is given to the world to show cause against their claim, and the

libel to which they respond, is *diverso intuitu*. It would be unprecedented in a petitory or possessory suit, to enforce a lien of a party who comes in merely as a respondent. If the libel itself were for the enforcement of a lien, the situation of these respondents might be different, as in the case of the Robert Fulton. Neither is their lien, if any they have, an objection to the granting of the decree prayed for. The lien created by the state statute is independent of the title or possession now in controversy, and cannot be affected by the decree.

But Messrs. Thayer & Merrill have attached the vessel at common law in a suit against the Messrs. Swasey, and claim to have that attachment preserved. They have not proceeded *in rem*, and their attachment is valid only in case the property attached is the property of Messrs. Swasey. It is partly to determine this very question, whether the vessel is the property of the Messrs. Swasey, or of the libellants, that this suit is brought. We are liable to be misled, in the first view of this point, by an impression that their attachment is in the nature of a proceeding against certain specific property on which they have a claim arising out of the nature and circumstances of their debt. But their attachment is no better, at the common law, than the attachment of any other creditor of the Messrs. Swasey, for a different cause of action, or than if laid upon any other property of the Messrs. Swasey.

Being satisfied that the ship and stores were not the property of the Messrs. Swasey when the attachment was made, and that Thayer & Merrill knew, when the debt was contracted, that the property libelled was bought with the money of the company and held by the Messrs. Swasey in trust, their attachment is no obstacle to this decree.

A portion of the stores have not been paid for. These, of course, the libellants cannot retain, without being bound for their value, though originally purchased without authority. The decree, as to the stores, must therefore be for the amount which has been paid for. In this view my attention has been called by counsel to the commissions charged by the Messrs. Swasey. They were to have commissions for services rendered, but I do not think that they have rendered valuable services to the company, and their conduct has been such that they are not entitled to compensation. I shall therefore treat the libel-

lants as entitled to the whole amount they have paid to the Swaseys, except actual expenses.

After this opinion was pronounced, the libellants made an arrangement with Messrs. Thayer & Merrill to return so much of the goods, as exceeded in value the amount which the libellants had paid to the Messrs. Swasey, and the decree was entered in the following form:

"And now after, &c. . . . . the court doth order, adjudge, and decree that the libellants have a right to the title and possession of the brig Taranto, her tackle, apparel, and furniture, and of the sea stores now on board said brig; also doth decree that the title to said brig, her tackle, apparel, and furniture, and to the sea stores now on board said brig, be vested in Nathaniel Adams, John T. Dingley, C. P. Danforth, C. G. Gill, and Marcus A. Thomas, for the use of the libellants; also doth order, adjudge, and decree that the possession of said brig, her tackle, apparel, and furniture, and of the sea stores now on board said brig be delivered to the libellants, or to the said Nathaniel Adams, John T. Dingley, C. P. Danforth, C. G. Gill, and Marcus A. Thomas, for the use of the libellants; also doth order, adjudge, and decree that the said Thomas H. Swasey, Edward Swasey and John M. Merrill, deliver the bill of sale of said brig Taranto, and the certificates of registry, enrolment, and license, and all other documents in their possession, belonging to said brig, and required by the laws of the United States, to the libellants, or to the said Nathaniel Adams, John T. Dingley, C. P. Danforth, C. G. Gill, and M. A. Thomas, for the use of the libellants; also doth order, adjudge, and decree that the said Thomas H. Swasey, Edward Swasey, and John M. Merrill pay to the libellants costs taxed at ——— dollars.

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*December Term*, 1848.

JAMES J. KNOWLTON, Libellant *v.* R. P. BOSS, Respondent.

Rights of seamen under Stat. 1840, ch. 48, § 19.

A claim for personal damages cannot be included in the same libel with a claim for the fine recoverable under Stat. 1840, ch. 48. Whether the admiralty have jurisdiction to enforce this fine, *quære.*

THIS was a libel in the admiralty by a carpenter of a merchant ship against the master. The allegations were that the master

flogged and imprisoned the libellant without justifying cause; refused him leave to see the American consul, when reasonably demanded; and compelled him to leave the vessel, whereby he lost his wages for the return voyage. Beside damages, the libel claimed the fine of one hundred dollars, imposed by the Act 1840, ch. 48, sec. 19.

SPRAGUE, J. delivered his opinion, in substance, as follows: This case is peculiar, not only on account of the principles involved, but because there is no important conflict in the testimony, and because both parties intended, in the main, as it seems to me, to do their duty.

The respondent was master, and the libellant carpenter, of the ship Edward Everett, on a voyage to Valparaiso and back. Capt. Boss is admitted to be a man of good character, and all the witnesses agree that he treated his crew well, so far as his personal conduct is concerned. The libellant is a master mechanic of good character, and I am satisfied did his duty conscientiously, and bore, with commendable patience, a great deal of bad treatment from the mate.

The mate, Mr. Crosby, was a man unfit to hold office on board ship. It is agreed that he commenced a course of misconduct a few days out, and continued it with little intermission, until after the arrival at Valparaiso. I am satisfied that his conduct put the lives and limbs of the crew in danger. The crew bore this treatment with patience, remonstrated in a respectful manner, and at last told the captain, under threats against their lives from the mate, that they could do duty no longer under him. Capt. Boss then promised them, that he would discharge Mr. Crosby when they arrived in Valparaiso, and upon this they returned to duty. It would have been more satisfactory if Capt. Boss had put Mr. Crosby off duty, at least for awhile, for it is evident that Crosby paid little attention to the mere words of the master. But on this point it is difficult to pronounce, as it depends upon so many considerations of expediency and convenience. On the day after the vessel arrived, four of the crew, in a respectful manner, told Capt. Boss they could do no more duty under Mr. Crosby. Capt. Boss insisted on their unconditional return to duty, and, on their refusal, took them ashore and placed them in jail. The libellant did not join

with these men in their refusal of duty. Some days after, the captain being necessarily much of the time on shore, and the crew left entirely under the control of the mate, Knowlton, during the captain's absence, was attacked and beaten by the mate. There is no evidence that this beating was provoked by any misconduct on the part of Knowlton. The next morning, when the captain came on board, Knowlton, in a respectful manner, refused to do duty any longer under Mr. Crosby, and demanded to see the American consul. Captain Boss insisted on Knowlton's unconditional return to duty, and offered no assurance as to the discharge or putting off duty of Crosby. There was a conflict of testimony as to whether he refused, in terms, to let Knowlton see the consul, but it is clear that he made no offer which met Knowlton's legal rights, or with which Knowlton was bound to be satisfied. Knowlton refused to continue under Crosby's command, and Captain Boss immediately had him seized in the rigging and flogged, with a dozen lashes, and then confined twenty-four hours in irons, after which Knowlton returned to duty. At this time the vessel was in port, where were other American vessels, and the consul's house was in sight, and only about a mile from the ship. There was no exigency requiring immediate performance of duty on Knowlton's part, no insubordination, or fear of any, from the crew; his manner was respectful, the mate's treatment of him had been intolerable, and he had a right to believe his limbs, if not his life, in danger. I have no hesitation in saying that, under such circumstances, he had a right to see the consul, and lay his complaint before him. I do not undertake to say what particular measure for security the consul might or should have taken, but at least a temporary security could have been afforded to the crew, in Capt. Boss's absence, by another officer being placed on board, or in some other way.

The act of 1840, ch. 48, sec. 16, provides as follows. "The crew of any vessel shall have the fullest liberty to lay their complaints before the consul or commercial agent in any foreign port, and shall in no respect be restrained or hindered therein by the master, or any officer, unless some sufficient and valid objection exists against their landing; in which case, if any mariner desire to see the consul or commercial agent, it shall be the duty of the master to acquaint him with it forthwith;

stating the reason why the mariner is not permitted to land, and that he is desired to come on board; whereupon it shall be the duty of such consul or commercial agent to repair on board and inquire into the causes of the complaint, and to proceed therein as this act directs."

This act gives a seaman the right, not only to see the consul, in a case like the present, but to see him on shore, away from the restraints of the ship, unless some valid objection exists to his landing, which is not pretended in this case. Captain Boss neither permitted him to land, nor alleged a reason why he should not land; nor did he acquaint the consul forthwith and request him to come on board. Knowlton had a right to have a suspension of proceedings, so far as punishment was concerned. The very question was whether he should be compelled to serve longer under Crosby. Captain Boss undertook first to settle this question by an ignominious punishment, and then to send for the consul, if at all, at his leisure. I do not, however, mean to say that an appeal to the consul in a foreign port is under all circumstances to suspend punishment or a forcible compulsion to duty. Still more was Knowlton's right violated by the ignominious punishment he received in the presence of the crew, and with the knowledge of his countrymen in port, which, to a person in his situation, a master mechanic, of a respectable station in life, is matter of serious consequence. I am satisfied that Captain Boss had no evil intention towards Knowlton, but he entirely mistook his own rights, and those of the crew. Nor is it wonderful that he did so. The misconduct of the mate had placed him in a trying situation. It was his duty to carry on the voyage without interruption, and it was difficult to procure a new mate. On the other hand, Knowlton was in a trying and dangerous situation, and the consequences of Crosby's misconduct should have been borne by the master or owners who shipped him, and not by an innocent party. The owners contract to give a seaman proper officers, and in this case they not only failed to do so, but failed to protect him effectually against maltreatment, when the character of the officer became known.

After remaining on board twelve or fifteen days, and there being no certainty that Crosby would be discharged at all, and no reliable assurance given to that effect, Knowlton left the ves-

sel, and came home without wages in another ship. When he left he was not treated either by the consul or Captain Boss as a deserter, and nearly all the crew had deserted before he left. I am of opinion that, under the circumstances, he had a right to leave the vessel, and is entitled to damages for loss of wages on the return voyage. I shall decree compensation for the punishment, the refusal to see the consul, and the loss of wages. The libel also claims the fine imposed by the seventeenth section of the above-named act. This section provides that if the master shall refuse to perform the duties imposed by the act, or shall violate its provisions, "he shall be liable to each and every individual injured thereby, in damages, and shall, in addition thereto, be liable to pay a fine of one hundred dollars for each and every offence, to be recovered by any person suing therefor in any court of the United States, in the district where such delinquent may reside or be found."

I have doubts whether there is jurisdiction in admiralty to enforce this fine. It is to be observed that it is not given to the mariner, but to "any person suing therefor." None of the cases cited at the bar go to this extent. The penalty of double wages for short provisions may be recovered in admiralty, but they are given to the seaman as wages, and are made recoverable by statute "in the same manner as their stipulated wages." The payment of two months additional wages for discharge in a foreign port, under the act of 1803, is enforced in admiralty, but this is given specifically as wages, is recoverable only by the mariner himself, and is, in fact, a kind of statute substitution for his original contract. No case has been cited of a fine recovered in admiralty, which was given specifically as a fine, to be recovered by any citizen suing therefor. But if this fine is recoverable in admiralty, there is an objection to the libellant's uniting in one libel a claim for personal damages with a claim for a fine which he sues for in a different capacity, that of a common informer. I am of opinion that the decree should be confined to damages.

Decree for one hundred and fifty dollars damages and costs.

*Richard H. Dana, Jr.*, for the libellant.
*John Phelps Putnam*, for the respondent.

*Supreme Judicial Court of Massachusetts, October Term, 1848, at Worcester.*

WILDER S. THURSTON *v.* ELHANAN WHITNEY ET AL.

To prove the incompetency of a witness on the ground of atheism, the opposite party are not confined to the result of an examination on the *voir dire*, but witness's disbelief may be proved by witnesses.

Whether a witness's disbelief in a future state of existence constitutes an objection to his competency if he believes in accountability to God, and that he will be punished in this life for false swearing, *quære.*

The provision of the constitution of Massachusetts, (Pt. 1, Art. 2d.) "that no subject shall be hurt, molested, or restrained, in his person, or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience: or for his religious profession or sentiment" does not refer to atheists and to their competency as witnesses.

AT the trial of this case in the court of common pleas, the defendant called one U. P. Haven as a witness. Before he was sworn, the plaintiff objected that he was an incompetent witness, because he did not believe in the existence of a God, or in a state of future rewards and punishments. The plaintiff offered to produce witnesses to sustain this objection. But the court (MERRICK, J.) declined to hear the testimony offered by the plaintiff, and admitted said Haven to be sworn. He was accordingly sworn, and testified on the trial. The jury found a verdict for the defendant, and the plaintiff filed exceptions to the ruling of the court.

*Dewey* for the plaintiff, cited 1 Greenl. Ev. § 368, 369; *Norton* v. *Ladd* (4 N. H. 444); *Curtis* v. *Strong* (13 Vermt. 363); *Arnold* v. *Estate of Arnold* (4 Day, 57); *Jackson* v. *Gridley* (18 John. 103.)

*Wood* for the defendant. The exclusion of the witness would be a violation of the constitution, *Hunscom* v. *Hunscom* (15 Mass. 184); *Commonwealth* v. *Buzzell* (16 Pick. 153.) Disbelief in a future state of rewards and punishments does not go to the competency of a witness, *Hunscom* v. *Hunscom*, (15 Mass. 184.)

WILDE, J. At the trial of this cause the defendants called a witness, to whose competency the plaintiff objected, on the

ground that he did not believe in the existence of a God, or in a state of future rewards and punishments, and offered to prove the same by witnesses.

It has been argued that this mode of proof was not admissible, the general rule of evidence being, that a witness shall not be permitted to disqualify himself by declarations, not under oath, made out of court, as they might be untruly made for that purpose. But it has been frequently held, that this mode of proof is admissible, and is an exception to the general rule, from the necessity of the case, it being deemed unreasonable that the party objecting should be restricted to the testimony of the witness on the *voir dire*, as the objection supposes he has no regard to the sanctity of an oath; and, if so, his declarations made under oath are of no more weight than those made seriously when not under oath. 1 Greenl. Ev. § 370. But the evidence of such declarations should be received cautiously. Remarks and avowals of belief, or disbelief, may be made in the heat of argument, and for the purpose of discussion, which may be no sure indications of the real belief or disbelief of the party.

So the witness, after having made such declarations, may have changed his opinions, which perhaps could not be proved unless he should be allowed to testify. But notwithstanding these objections, which have some weight, it is well settled that the avowal of a witness of his religious belief may be proved, like any other fact.

It has been also argued that the disbelief of a future state of existence after death is no objection to the competency of a witness, provided he believes in his accountability to God, and that he will punish him in this life for false swearing or other evil deeds. In *Hunscom* v. *Hunscom* (15 Mass. 184,) it was held that a mere disbelief in a future existence went only to a witness's credibility. Whether such was the evidence offered in this case does not distinctly appear; — it might be that the witness could be proved to disbelieve a future state of rewards and punishments in this life. But however this may be, it is immaterial in the decision of this case, for if such disbelief would not disqualify the witness, the plaintiff should have been permitted to prove that he disbelieved the existence of a God. On this point the law is extremely clear; and so it has been

held from time immemorial. Lord Coke held that an infidel, meaning a person not believing the scriptures of the old or new testaments, was an incompetent witness. But this opinion of Lord Coke has not been sustained by later authorities, and seems never to have been well founded. The question was very fully considered in the case of *Omichund* v. *Barker*, (1 Atk. 21, S. C. Willes, 545.) And it was settled in that case that an infidel in general could not be excluded from being a witness, if he believed in a God and future rewards and punishments, but if he did not so believe, he ought not to be admitted as a witness. And all the authorities agree that an atheist, who disbelieves in the existence of a God, who is "the rewarder of truth and avenger of falsehood," cannot be permitted to testify. It would indeed seem absurd, to administer to a witness an oath, containing a solemn appeal to God for the truth of his testimony, in whose existence he has no belief. 1 Greenl. Ev. § 368, 369, and the cases cited. 3 Dane Abr. ch. 98. art. 2. *Jackson* v. *Gridley* (18 John. R. 98); *Arnold* v. *Estate of Arnold* (4 Day, R. 51.)

But the defendant's counsel contend, that this rule of law has been abrogated by the constitution, pt. 1, art. 2, which provides, "that no subject shall be hurt, molested, or restrained, in his person, or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience: or *for his religious profession or sentiments.*"

In the opinion of the court, this article has no reference to atheists and to their competency as witnesses. It was intended to prevent persecution by punishing any one for his religious opinions, however erroneous they might be. But an atheist is without any religion, true or false. The disbelief in the existence of any God, is not a religious, but an anti-religious sentiment. If, however, it were otherwise, the rejection of a witness for such a disbelief or sentiment, as incompetent, would be no violation of said article in the constitution. It is not within its words or meaning. It would not hurt, molest, or restrain him, in his person, liberty, estate. We are therefore very clearly of the opinion that the witness was incompetent, and ought not to have been allowed to testify.

Exceptions sustained.

*District Court of the United States for the Northern District of New York.*

AARON D. PATCHIN *v.* THE STEAMBOAT A. D. PATCHIN, HARRY WHITAKER, Claimant.

An assignment by a mariner of his wages confers upon his assignee no right to maintain a suit *in rem* against the vessel, for the recovery of the wages assigned.

THE material facts of the case are stated in the opinion of the court.

*Daniels*, for the petitioner.
*Talcot*, for the claimant.

CONKLING, J. A libel having been filed, and a warrant of arrest issued and executed against the *Patchin*, in behalf of two seamen, for wages, the petitioner soon afterwards presented his petition, setting forth that he was the assignee of the wages due to a large number of other seamen who had also served on board the *Patchin*, whose claims in the aggregate amounted to the sum of $2385.11, as appeared by certificates given to them respectively, at the time of their discharge in September last, by the check of the *Patchin*. The petitioner further states that this sum was advanced by him to P. S. Marsh, at his request, and upon his representation that the seamen had become clamorous for their pay, for the purpose of enabling Marsh to pay them off. Marsh, in making this application to the petitioner, appears to have been acting in behalf of D. N. Barney, who was absent at the time, and who claimed to be the owner of the *Patchin* as purchaser at a sale by the sheriff of Erie county, in virtue of a mortgage.

When the money was paid to the seamen by Marsh, he took from each of them an assignment of his demand to Barney; which assignments the petitioner alleges were taken by his direction and for his benefit, with the expectation on his part, that the money would soon be refunded, and that the mariners' lien would remain valid.

These transactions occurred in September last; and in November last, Barney executed assignments of the same demands to the petitioner. The demands of the original libellants have in the meantime been satisfied, and the petitioner now asks for a decree in his favor for the amount so by him advanced, and for the sale of the vessel.

The claimant, in his answer, insists that Barney claimed to be the owner of the Patchin, and that the money was in fact paid by him in that character; and he denies that the mariners' lien passed to the petitioner in virtue of the assignments, admitting the money to have been furnished by the petitioner on his own account.

The evidence proves that the petitioner did in fact advance the money to Marsh, and that assignments were executed, as already stated; but it sheds no light upon the motives or expectations which governed the petitioner.

Without adverting more particularly to the allegations of the answer, it is evident that under any view of the case unwarranted by the facts appearing before the court, it is incumbent on the petitioner to maintain that an assignment by a mariner of his claim to unpaid wages confers upon his assignee a right to maintain a suit *in rem* in his own name for the recovery of such wages against the vessel on board of which the services of the mariner were performed.

The counsel for the petitioner insists that although choses in action are at law held not to be assignable, yet that being held valid in chancery, this court administering justice, as it is required to do, according to the principles of equity, is bound to recognize and enforce the title set up by the petitioner. No judicial decision to this effect has been cited, nor have I been able to find any. Undoubtedly a court of admiralty, in the exercise of its powers as such, may, and sometimes should, disregard the narrow and technical distinctions of common law proceedings, and apply those which under like circumstances, would govern the decision of a court of chancery. But this is true with regard only to these matters, which, independently of these principles, fall strictly within the scope of the admiralty jurisdiction.

It was correctly argued by the counsel for the petitioner, that in cases arising *ex contractu*, the admiralty jurisdiction

depends on the nature of the contract; and it is true, also, that this jurisdiction is not always confined to the immediate parties to the contract. Thus a bottomry bond is assignable and may be enforced in the name of the assignee. But bottomry is an express hypothecation, and binds the ship to the lender and his assigns.

So also is a bill of lading assignable, or rather negotiable, and the holder may in this country maintain an action in the admiralty upon it, in his own name. But the quality of negotiability is given to this instrument by law for the benefit of trade, and its transfer moreover carries with it the title to the goods shipped, and of course the right to maintain a suit upon it for their value in case of their loss. The right of the mariner to proceed against the ship *in specie*, is conferred upon him for his own exclusive benefit. It arises by implication, and exists independently of possession. Its object is the more certainly to secure to him the hardly earned fruits of his perilous and useful services. When, therefore, his wages are paid, no matter by whom, the design of the privilege is answered; and, to say the least, it is very questionable whether he would be benefited by the capacity to transfer it to another: for if this power would sometimes enable him to obtain immediate payment, it would also expose him to imposition through his credulity and proverbial improvidence. It may well be apprehended, also, should this become the established and known law, that advantage would be taken of it for the gratification of unworthy feelings, at the expense of ship owners. The power to arrest a ship for the purpose of enforcing the payment of a debt, however insignificant, is a privilege liable to great abuse, even when confined to the mariner; insomuch that congress has seen fit by well known special legislation, to regulate and restrict this right. No process against the vessel can lawfully issue without a magistrate's certificate granted after summons to the master; and when the amount recovered is less than $100, the costs recoverable are limited to one half of the amount. A privilege regarded with so much jealousy by the legislature ought not to be unnecessarily extended by the courts. Implied liens are admitted with unsparing caution by the common law. Being allowed for the benefit of trade, they are limited to that object, and are held, also, to be strictly personal. The right of lien

depends on the actual possession by the person claiming it, of the goods to which it is attached; and if he parts with the possession, the lien is irretrievably lost.

In the absence of any authority to the contrary, I am of opinion that the mariner's lien ought in like manner to be considered as restricted to its design, and as merely personal. The petitioner cannot justly complain of being denied the privilege of maintaining a suit *in rem* in the admiralty: the ordinary forms of remedy in favor of an assignee of a chose in action are open to him in common with all others.

The petition must be dismissed with costs.[1]

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*District Court of the United States, Massachusetts District.*

THE JOHN WALLS, Jr. — NATHANIEL C. JACKMAN ET AL. Libellants, JOHN WALLS, Jr., Claimant.

Admiralty jurisdiction under local statutes. Rule as to costs.

THIS was a libel in the admiralty, to enforce the lien of material men. The libellants had furnished a quantity of copper nails, marks, dove-tails, and other copper fastenings, to be used in repairing the vessel libelled at Salem. When the proceedings were commenced, it was thought that she was a domestic ship, but it appeared from the answer that she was owned in the state of Maine. The vessel, when the warrant was issued, was in Boston, but twenty days had not elapsed since her departure from Salem. The libel contained an allegation, that by a stat-

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[1] We suppose the principle of this decision is undisputed. A mariner's right to proceed *in rem* for wages, is a personal privilege, and the jurisdiction of the court is referable to the position of the libellant quite as much as to the character of the contract. The reason assigned in the reign of James I. by the common law courts in refusing a prohibition to the admiralty in a case of mariner's wages, was that the case was one of "*poor mariners*, who might not be delayed in the admiral's court." The practice in this part of the country has uniformly proceeded on this principle, but we are happy, in the present crude state of the admiralty law in the Western country, to publish an opinion of so able a judge.

ute of this commonwealth (Stat. 1848, ch. 290) the libellants' claim constituted a lien upon the vessel, and contained no allegation as to her citizenship, whether foreign or domestic. The demand upon which the libellants founded their claim for a lien, was set forth in a long account, in which the "bark John Walls, Jr., and owners" were charged in detail for copper nails and other materials. They were credited by a certain amount of old copper, &c. The respondent did not dispute the items and amount claimed by the libellants, but contended that a six months' credit was given, and as that time had not expired, the libel ought to be dismissed. The libellants sustained their charges by their own books, and the evidence of the ship-carpenter who repaired the bark, and contended that it was a sale for *cash*. The claimant produced an agent, who testified that a conversation took place between said agent and one of the libellants, in which the latter promised to furnish *nails* on the same terms which he had furnished spikes for the vessel once before, namely, twenty-two cents, six months; it appeared by the books of the libellants, and the testimony of one of them, that such a sale of spikes on six months, was made some time previously. The agent also testified that one of the libellants told him that that was "as cheap as they could be got in Boston." This was contradicted by a workman in the libellants' shop, who testified that he was present and must have heard the whole conversation. He testified that the libellants said they should charge "twenty-two cents per pound, as cheap as they could be obtained in Boston." He said he heard no more, and that he was in a position where he thinks he must have heard every thing. A Boston merchant testified that his six months' price was twenty-two cents.

The counsel for the libellants also submitted the question whether this action to enforce the lien might not be sustained, before the term of credit had expired. The language of the Massachusetts statute is "Whenever a debt is contracted, &c."

*S. H. Phillips*, for libellants.
*Isaac Story, Jr.*, for respondent.

SPRAGUE, J. This court has full jurisdiction in this case. Courts of admiralty may enforce liens created by local statutes.

A libel to enforce such a lien need not describe the citizenship of the vessel. The statute of 1848 applies both to foreign and domestic vessels. The only difference is, that the lien upon a foreign vessel is not affected by the limitations of the second section of that statute. The most difficult question here is a question of fact; — whether or not a six months' credit was given. For a lien resulting from a contract which contains an agreement to give credit cannot be enforced until the expiration of the credit. *The Nestor*, (1 Sumner, 73); *The Chusan*, (2 Story, 455). In regard to the question of fact, there is a direct conflict of evidence, and under such circumstances, the principle of law requires that the *affirmative* evidence of the agent must be credited rather than the *negative* evidence of the workman. By the testimony of the former, it appears that there was a contract to furnish "nails" at twenty-two cents per pound, and on a credit of six months. Consequently, as to the "nails" this proceeding was premature. But as to the other articles, (marks, dove-tails, &c.) it was not premature. The value of these articles exceeded by $14.76 the amount credited upon the account annexed, which amount must be appropriated to the payment of the demand first becoming due. The libellants are entitled to a decree for this excess. But as it does not appear that the libellants ever limited their demand to this small amount, they cannot take costs.

Decree accordingly.

A question was subsequently made in taxing costs. A previous libel had been filed against this bark, and according to the established usage in the marshal's office, the "custody fees" had been charged exclusively to the first libellant. But the court held that it must be apportioned among all the libellants.

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## *Supreme Judicial Court of Massachusetts.*

[The opinions, of which abstracts are furnished below, will appear in the forthcoming volume (1st) of Cushing's Reports.]

### *Suffolk and Nantucket, March Term,* 1848.

*Commonwealth* v. *Rollin Doane.* A custom for one man to take the property of another, and convert it to his own use, without the consent of

the former, or giving him an equivalent therefor, is bad on its face, and cannot be supported.

A defendant indicted for larceny, in whose possession a portion of the cargo of a vessel is found, under circumstances which, if unexplained, would authorize a jury to presume a felonious taking by him, is not entitled, in order to negative the inference of an intent to steal, to give evidence of a custom for the officers of vessels to appropriate a small part of the cargo to themselves, or to prove that instances had occurred, in which the mates of vessels, under a claim of right, had appropriated to themselves parts of the cargoes in their possession.

A person employed as a laborer, to discharge the cargo of a vessel, does not stand in the relation of a bailee to the property of which the cargo consists.

*Thomas B. Field* v. *The Proprietors of Common and Undivided Land in Nantucket.* The liability of the owner or occupant of land, which has lain unenclosed, on enclosing or depasturing the same, to pay for the one half of a partition fence, under the Rev. Sts. *c.* 19, § 12, attaches *immediately* upon such enclosing or depasturing.

The right of an owner, who has erected a partition fence, to recover the value of one half thereof, against the owner of adjoining land, is complete by the commencement of proceedings to have the value of such half ascertained by fence viewers; and cannot be defeated by a sale of the land, and a notice by the purchaser, that he does not intend to occupy, or improve, or enclose it, subsequent to the application to the fence viewers, and notice of such application by them to the original owner, though previous to any further proceedings by them.

The *St.* of 1847, *c.* 102, repealing the Rev. Sts. *c.* 19, § 12, so far as relates to Nantucket, and providing that the depasturing only of unenclosed land in that island shall not render the owner or occupant liable for the erecting of a partition fence, is entirely prospective in its operation.

The authority of an attorney, who has been employed by a director or other analogous officer of a corporation, to appear for it, without any specific vote therefor, and who has been paid for his services by the corporation, cannot be questioned.

*Peter F. Ewer* v. *George Myrick, Jr.* A promissory note, for the payment, "ten years after date," of "seven hundred and fifty dollars, with interest semiannually, fifty dollars of the principal to be paid annually until the whole is paid," is a contract that the interest shall be paid semiannually, that fifty dollars of the principal shall be paid annually, and that the whole amount of the note, principal and interest, shall be paid in ten years after date.

The promisee, by an agreement under seal, executed on the same day with the note, covenanted with the promisor, that "if said note should not be paid at the expiration of the said ten years," he would "give up said note" to the promisor, provided the latter should execute to him a quitclaim deed of certain land mentioned in the agreement. It was held, that this agreement (assuming that the note and agreement constituted an entire transaction, which the court did not decide) did not preclude the

promisee from enforcing payment of the interest, and such instalments as should become due, before the expiration of the ten years.

*Peter F. Ewer* v. *Thomas Coffin.* A personal service by notice, in order to give the courts of one state jurisdiction of a cause, the defendant in which resides in another, so that a judgment in such cause may be enforced in the latter state, must be such a notice as a court is competent to direct, and which can be served within its jurisdiction.

Where a court in Rhode Island, in which an action had been entered against a defendant who was not resident within the state, and who did not appear, ordered personal notice of the pendency of the suit to be given him, which was effected by the reading of the writ and order of the court in his presence, by the sheriff of Nantucket, within his precinct, it was held, that this notice was not such personal service, as to be the foundation of a judgment, which might be enforced in this state; whatever effect it might be entitled to, (which the court did not decide,) if the court in Rhode Island had also obtained jurisdiction of the cause by an effectual attachment of property.

An attachment of property, in order to give the courts of one state jurisdiction of a cause, the defendant in which resides in another, so that a judgment in such cause may be enforced in the latter state, must not be merely formal or nominal, but actual and effectual; and, unless the record of the judgment discloses such an attachment, no effect ought to be given to the judgment, out of the state in which it was rendered.

Where an action was commenced in Rhode Island against a person not resident therein, and the only service of the writ was effected by an attachment of articles of trifling value, set out to the officer by the plaintiff, as the property of the defendant, and by an attested copy of the writ and of the officer's doings thereon being left with the plaintiff, who was in possession of the articles attached, it was held, that this was a merely nominal or formal attachment, and not such an actual and effectual one, as to be the foundation of a judgment, which might be enforced in this state.

If the record of a judgment, rendered in another state, set forth that notice of the action was given to the defendant, or that property was attached, and also what notice was given, or in what manner the attachment was made, the court will judge, upon the facts so stated, whether the notice or attachment was sufficient.

The jurisdiction of state courts being limited by state lines, it is difficult to see how the order of a court, served upon a party out of the state in which it is made, can have any greater effect than knowledge brought home to the party in any other way.

Mere knowledge of the pendency of a suit in the courts of another state, without service of the process, or an appearance, is not sufficient, of itself, to compromise the rights of the party in this state.

*Levi Whitney* v. *Richard Walsh.* The sentence, or decree of a court of admiralty and maritime jurisdiction, *in rem*, is binding on all the world, as to matters which were directly in issue therein: and, therefore, where an information was filed in the district court of the United States against certain goods alleged to have been imported contrary to law, and, upon the

proceedings thereon, the court adjudged and decreed, that the said goods be and remain forfeited to the United States — it was held, that the judgment was conclusive evidence, that such goods were liable to forfeiture, not only at the time of the decree, but also at the time of their importation.

*Commonwealth* v. *Jabez M. Davidson.* In an indictment for cheating by false pretences, an allegation, that the prosecutor, by means of the false representations, was induced to deliver, and did deliver to the defendant certain goods, "as upon a sale upon credit," is sufficiently proved by evidence of a sale of the goods to the defendant, on his promissory note payable in four months.

An indictment for cheating by false pretences alleged, that the defendant represented a firm of which he was a member to be then owing not more than three hundred dollars, and evidence was given of a representation by him, that the firm did not then owe more than four hundred dollars; — this was held to be a fatal variance.

One of the representations, set forth in an indictment for cheating by false pretences, and proved, was, that the defendant gave a false name; and the prosecutor testified that this misrepresentation had no influence in inducing him to part with his goods; it was the duty of the court, either at the time, or in the charge, to instruct the jury that such misrepresentation was not, upon the evidence, proved to have been an inducing motive to the obtaining of the goods by the defendant.

In an indictment for cheating by false pretences, it was alleged, that the defendant represented that he was a partner in trade with another person, who had put into the partnership a capital of one thousand dollars, which they, (the defendant and his partner) then had invested and employed in their partnership business, and that the copartners were worth property to the value of fifteen hundred dollars, and did not owe debts amounting to more than three hundred dollars; — it was held, that evidence of the individual indebtedness of the defendant and his partner was not admissible to prove that the representations as to the solvency of the partnership were false.

Where a party, on notice and demand, produces books or papers, which are inspected by the party calling for them, and used as evidence by him, such books or papers thereby become evidence for the party producing them: and, therefore, where the partner of a defendant, who was on trial for cheating by false pretences, being called by the latter as a witness for him and examined in chief, produced the account books of the firm, on notice and demand by the prosecuting officer, who thereupon cross examined the witness with reference to two entries in the books, and exhibited them to the jury, with reference to those two entries: it was held, that the books thereby became evidence for the defendant, as to their entire contents, and not merely with reference to the two entries for which they were originally introduced.

*Commonwealth* v. *Elizur Wright.* It is libellous to publish of one, in his capacity of a juror, that he agreed with another juror, to stake the

decision of the amount of damages, to be given in a cause then under their consideration, upon a game of draughts.

It is a general rule of pleading in civil as well as in criminal cases, that, where a charge is brought against a defendant, arising out of the publication of a written instrument, the instrument itself must be set out in the writ or indictment.

An indictment for a libel must not only contain, but it must also profess to set out, the very words of which the alleged libel is composed, that is to say, a transcript of the libellous publication, or of that part of it, which is the subject of the indictment.

Marks of quotation, used in an indictment for a libel, to distinguish the libellous matter, are not sufficient to indicate that the words thus designated are the very words of the alleged libel.

The words, "according to the purport and effect, and in substance," in an indictment for a libel, do not import that the very words are set out.

The word "tenor," imports an exact copy, and that it is set out in words and figures.

An indictment for a libel alleged, that the defendant published, &c., an unlawful and malicious libel, *according to the purport and effect and in substance*, as follows: — the words between *libel* and *as follows* cannot be rejected as surplusage.

*Commonwealth* v. *Walter Scott Tarbox*. An indictment for printing, publishing, or distributing an obscene paper, within the Rev. Sts. c. 130, § 10, must not only set out the printed paper in the very words of which it is composed, but must also profess to do so by means of appropriate words for the purpose; unless the language is so obscene as to render it improper that it should appear upon the record; and in that case, the reason for the omission should be stated in the indictment.

The attaching of one of the original printed papers to the indictment, in place of inserting a copy, is not a sufficient indication, that the paper is set out in the very words.

*Joseph A. Tolman* v. *The Manufacturers' Insurance Company*. A policy of insurance against fire contained a proviso, allowing the insurers, at their election, instead of paying a loss in money, to replace the property lost or damaged, with other of the like kind and quality, within sixty days after notice of the loss or damage: after a loss under such a policy, the assured, by an order thereon, directed the loss to be paid to another, and the insurers assented thereto: it was held, that such order and assent operated only as an assignment of the claim of the assured under the policy, without affecting the right of the insurers to replace the property lost or destroyed, or to pay the amount of the loss in money, at their election.

*Joseph W. Merriam* v. *Samuel K. Bayley*. In an action against an insolvent debtor, to recover a debt, from which he has been discharged, the plaintiff must prove a distinct and unequivocal promise to pay the debt; and the mere payment of a part of a note so discharged, and the indorsement thereon by the debtor of the sum paid, are not sufficient to authorize a jury to infer such distinct and unequivocal promise to pay the residue.

*Anthony Brackett and another* v. *Franklin Evans.* Where the declaration alleged, that the defendant, in consideration that the plaintiff would sell and convey to him five dwelling-houses, &c., promised to pay the taxes that were or should be assessed thereon for the current year; and the proof showed, that the payment of the taxes was not the whole consideration of the conveyance: — it was held, that there was no variance.

Where the purchaser of real estate promised the seller to pay the taxes thereon for the current year, and, on being notified of the assessment, neglected to pay the same, and the seller thereupon himself paid the taxes; the latter was held to be entitled to recover the amount so paid without a previous demand.

A promise by the purchaser of real estate, at the time of the conveyance, to pay the taxes that are or may be assessed thereon, for the current year, is not "a contract for the sale of lands, &c., or of any interest in or concerning the same," within the meaning of the Rev. Sts. *c.* 74, § 1.

A conveyance of real estate cannot be proved by oral testimony without first giving a sufficient reason for not producing the deed.

*Matthew Bartlett* v. *Elisha Parks and others.* Where one of two partners, after a dissolution, consigned partnership property to an agent for sale, the proceeds to be applied to the payment of a partnership debt, the other partner was held to be entitled to a remedy in equity against the agent, under the Rev. Sts. *c.* 118, § 43.

The partner, by whom the consignment was made, having become insolvent, he and his assignee were properly made defendants.

*Albert Sanderson* v. *Thomas L. Taylor.* The twelfth section of the insolvent act (*St.* 1838, *c.* 163,) relating to the calling of a third meeting of creditors, is not repealed by the act of 1844, *c.* 178; and, therefore, where a third meeting of creditors has not been called, a certificate of the insolvent's discharge is not valid against a creditor who has not proved his claim.

*Thomas L. Thurston* v. *Daniel McF. Thornton* Where a conversation is relied upon as proof of an agreement, it is for the jury to decide, whether such an assent of the minds of the parties took place, as to constitute a valid contract, or whether what passed between them was a loose conversation, not understood or intended as an agreement.

*Dorcas Fay* v. *William C. Fay and others.* In order to satisfy the proviso in the Rev. Sts. *c.* 62, § 4, — "unless it shall clearly appear by the will that the devisor intended to convey a less estate," — the intention of the testator need not be declared in express terms: it is sufficient, if such intention can be clearly and satisfactorily inferred (on a comparison of the different parts of the will,) either from particular provisions which are inconsistent with an intent to give a fee, or from the general import, scheme, and object, of the will.

Where a testator, in lieu and bar of dower, devised the "use and improvement" of one third of his real estate to his wife, and bequeathed her certain personal estate, during her life, and the income of certain other personal estate, during her widowhood, and also made devises in fee of certain real estate, by the use of the proper technical terms: it was held,

that, by the words "use and improvement," the wife took an estate for life in the real estate; and (admitting the devise to her to be within the Rev. Sts. *c.* 62, § 4, which the court did not decide) that the statute did not enlarge her estate to a fee, as it clearly appeared, by the will, that the devisor intended to convey a less estate.

Trustees under a will being authorized and empowered "to grant and sell the whole or any part" of the testator's "estate real or personal, with full power to execute any deed or deeds effectual in law to pass a complete title thereto;" — it was held, that the legal estate did not vest in the trustees.

A testator gave his wife the use and improvement of one third of his real estate, together with certain personal estate, during her life, and the income of certain other personal estate, during her widowhood, and gave the residue, &c., of his estate, real, personal, and mixed, to trustees, in trust to manage, &c., and to pay over quarterly, to the several beneficiaries under the will, the rent, income, and interest of the said estate, including and embracing that the use whereof was devised to his wife; — it was held, that the trust did not extend to and include the real estate, the use and improvement of which was devised to the wife.

Where a petitioner for partition alleged a seizin in fee, and, upon the facts as agreed by the parties and submitted to the court, it appeared that the petitioners' interest was only for life, the petition was amended so as to conform to the opinion of the court, and judgment for partition awarded accordingly.

*Benjamin Blaney* v. *Nancy Blaney, and others.* The rule, established in England, — that residuary devises are to be regarded as specific on the ground, that a testator can only dispose of the lands owned by him, at the time of making his will, — if it ever was in force here, was abrogated by the Rev. Sts. *c.* 62, § 3, by which testators are enabled to dispose by will of subsequently acquired real estate.

Where the estate of a devisee is taken for the dower of the testator's widow, the right of such devisee to contribution, under the statute of 1839, *c.* 96, is the same that it would have been under the Rev. Sts. *c.* 62, §§ 25, 26 if the estate devised to him had been taken for the payment of the testator's debts.

A residuary devisee, whose estate is taken for the dower of the testator's widow, is not entitled to contribution from the other devisees, under the statute of 1839, *c.* 96.

*Eliza O. Brimmer* v. *William D. Sohier, Executor.* Where the words used in a will, if construed according to their technical force and meaning, would defeat the obvious intention of the testator, such a construction is not to be adopted.

Where a testator, by a residuary clause, devised the residue of his real and personal estate "to the survivors of his brother and sisters," naming them; — it was held, that this was a devise of an estate in common to all the devisees who should survive the testator, with the right of possession immediately after his decease, and not a devise upon a contingency, to the two out of the three persons named who might survive the third.

The effect of a codicil, ratifying, confirming, and republishing a will, is to give the same force to the will, as if it had been written, executed, and published, at the date of the codicil.

Where a will was made before, and a codicil added after, the passing of the revised statutes, it was held, that the will might operate upon after purchased real estate, in the same manner, as if it had originally been made at the date of the codicil.

Under the Rev. Sts. *c.* 62, § 3, which provide for the passing, by will, of after purchased real estate, "if such shall clearly and manifestly appear, by the will, to have been the intention of the testator," it is not necessary, that the intention should be manifested by an express declaration; but it is sufficient, if it can be inferred from the several provisions of the will; and the true question sems to be, whether the testator intended to die testate as to all the property which he might leave, or whether he was content to die intestate as to a part, and to leave it to be distributed according to law.

Wherever there is a devise of the whole estate, or of all the residue of the estate, of a testator, — there being both real and personal estate upon which the will may operate, — an intention to give after acquired real estate may perhaps be justly inferred, unless there be some indication of a different intention to be found in the will.

*William Furness, Executor,* v. *Charles Fox.* A legacy to one, "if he shall arrive to the age of twenty-one years, then to be paid over to him by my executor," is not a contingent but a vested legacy.

*Herman J. King* v. *Owen Howard.* Where an agreement was made for the loan of fifty dollars, for one week, for the sum of two dollars to be paid as interest therefor; and, at the expiration of the week, the lender agreed to allow the loan to remain, on condition that the borrower would pay therefor at the rate of two dollars a week, for so long a time as the loan should remain unpaid; and, in persuance of this agreement, the borrower paid two dollars a week for twenty-four weeks, and brought an action on the Rev. Sts. *c.* 35, § 3, to recover threefold the amount of interest so paid; it was held, that he was a competent witness, under § 4, both to the original agreemeht and to the subsequent payments.

Where the plaintiff recovered a verdict for a trifling amount more than the facts alleged in his declaration would entitle him to, the court refused to set aside the verdict, and order a new trial, for the correction of the error, provided the plaintiff would release the excess from the amount of his judgment.

Duplicity in pleading can only be taken advantage of by special demurrer; and, special demurrers being abolished, this objection cannot now be maintained.

*The President, Directors, &c., of the Tremont Bank* v. *The City of Boston.* The real estate of a bank, including its banking-house, is liable to taxation in the town where such estate lies.

*Joshua Jennison* v. *Charles F. Stafford.* A promise to forbear, for six months, to sue a third person, on a just cause of action, is a valid and sufficient consideration for a promissory note.

In a suit, by the payee against the maker, on a promissory note, given in consideration of a promise to forbear to sue a third person for six months, the burden of proof is not on the payee, to show that he has forborne according to his promise, but on the maker, to show that he has not.

*John C. Adams* v. *Harrison Porter.* The defendant, in a bill of discovery, is not bound to answer any interrogatories, which may be used as evidence against him on a criminal charge.

The allegation of combination and fraud should be omitted in a bill of discovery.

The rule of the English courts of equity, that the plaintiff in a bill of discovery "shall only have a discovery of what is necessary to his own title, and shall not pry into the title of the defendant" (Cooper Eq. P. 58,) is not applicable in this commonwealth.

The assignee of an insolvent debtor, who has commenced an action of trover for the recovery of personal property, mortgaged by the insolvent before his insolvency, may maintain a bill of discovery against the mortgagee, for the purpose of obtaining evidence to impeach the title of the latter.

Where the defendant in a bill of discovery demurred, and the demurrer was sustained as to certain formal parts of the bill, and was overruled as to the residue, and was then withdrawn, and the bill amended, it was held, that the defendant, notwithstanding the delay produced by filing the demurrer, should be entitled to his costs, on filing full and proper answers.

*The President, Directors, &c., of the Dorchester and Milton Bank* v. *The President, Directors, &c, of the New England Bank.* An agent has no right to delegate his authority to a sub-agent, without the assent of his principal; but, where from the nature of the agency, a sub-agent must necessarily be employed, the assent of the principal is implied; as, where a draft payable at a distant place, is left with a bank for collection, it must be presumed, that it is intended to be transmitted to a sub-agent, at the place where it is payable, and not that the bank is to employ its own officers to proceed there, for the purpose of obtaining payment.

A bank, by which notes and bills, payable at a distant place, are received for collection, without specific instructions, is bound to transmit or to cause the same to be transmitted, by suitable sub-agents, to some suitable bank, or other agent, at the place of payment, for that purpose; and where suitable sub-agents are thus employed, in good faith, the collecting bank is not liable for their neglect or default.

The D. and M. Bank, at Milton, in this state, having discounted a number of drafts payable in Washington, in the District of Columbia, transferred the same, by a general indorsement, and without any specific instructions, to the N. E. Bank, in Boston, their general agents, for collection: the latter, having no correspondent in W., transferred the drafts, by a like general indorsement, to the C. Bank, in Boston, then and afterwards in good credit, for collection: the C. bank transmitted the drafts to their correspondent, the Bank of the M., in W., for the same purpose: the C. Bank having subsequently failed, the N. E. Bank demanded the drafts of

the B. of the M. before they became due: the latter refused to deliver the drafts, but collected them, and applied the proceeds to the payment of a balance due them from the C. Bank; whereupon the N. E. Bank commenced an action against the Bank of the M. to recover the amount: — it was held, 1, that the N. E. Bank, having acted in good faith, and the C. Bank being a suitable agent, had authority to employ the latter to make the collection; 2, that no proof of general usage was necessary to give the N. E. Bank such authority; and, 3, that, as the drafts were transferred to the N. E. Bank, by a general indorsement, that bank might transfer them in the same manner to the C. Bank, and were not bound to make a restricted indorsement.

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## *Berkshire, September Term*, 1848.

*David Smith* v. *Moses Sweet.* The will of a married woman, under the statute of 1842, *c.* 74, is not valid, unless the assent of the husband be given thereto, in writing, and indorsed thereon, during her lifetime.

*Richard Vosburgh* v. *John W. Moak and others.* Where several persons were engaged in playing a game of ball in the public highway, and a traveller lawfully passing thereon was accidentally struck by the ball, it was held, that all the persons so engaged were liable in trespass; provided, that, from the width of the road, and the number of persons usually passing thereon, for the ordinary purposes of travel, the game was of such a character, as to be likely to endanger the safety of travellers and passengers, and that the individual, by whom the ball was thrown, was acting in the usual manner of persons engaged in such game.

*Seth King and others* v. *Ralph Little and others.* Ancient books, purporting to be the records of the Lower Housatonic Proprietary, produced by the clerk, were held admissible as evidence, without proof of the original and continued organization of the proprietary.

Office copies of registered deeds, purporting to have been executed in 1736 and 1744, are admissible in evidence, without other proof.

M. K., in 1736, by a deed, which was absolute upon its face, conveyed an estate to P. L.; who, in 1742, conveyed the same estate to R. K., by a deed, in which it was recited that R. K. had purchased M. K.'s right of redemption therein; it was held, that this recital was no ground for presuming that the first deed was a mortgage.

The following terms in a conveyance, namely, "all right, title, and interest, that I have or ought to have to a tract or parcel of land situated in *Great Barrington*, being the same that was bequeathed by my father B. K., deceased, to my children," are not sufficient to pass an estate in *Sheffield*, although the testator possessed an estate there which he devised to the children of the grantor.

## *Hampshire, &c., September Term*, 1848.

*Edmund K. Bussing* v. *Caleb Rice.* Where goods, which have been obtained by means of a fraudulent purchase, are seized under a warrant of insolvency, as the property of the buyer, the seller may maintain replevin therefor, against the messenger, without a previous demand.

*The Trustees of School District Number Three in Blandford* v. *Franklin W. Gibbs.* An act of the legislature, in addition to a former act, creating a corporation for the management of a trust fund, was passed without the knowledge or request of the corporation, and was never adopted by any direct vote: but the corporation having elected certain officers provided for by the act in addition, and such officers having exercised the powers thereby conferred on them, for nearly ten years; it was held, that these proceedings were equivalent to, or sufficient evidence of a formal assent and adoption by the corporation.

It is no objection to an election, that illegal votes were received, or legal votes rejected, unless the majority is thereby changed.

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## *Worcester, October Term*, 1848.

*Erastus Davis* v. *Samuel Davis.* An administrator is not liable as the trustee of one entitled to a distributive share in the estate of his intestate, until after the filing and approval of his administration bond, and the delivery of letters of administration to him by the judge of probate.

Where two trustee processes are served at the same time, and judgment is recovered in each, for a sum greater than the amount in the hands of the trustee, each of the creditors is entitled to one half of the funds, although their several judgments are for unequal amounts.

*Frederick D. Sampson* v. *Appleton Clark.* Where a judgment is obtained against an insolvent debtor, after the first publication of the notice of issuing the warrant, the judgment is not provable against his estate, because it was not in existence, at the time of such publication, and the original debt is not provable, because it is merged in the judgment.

*Smith R. Watson and wife* v. *Luther G. Moore.* In an action of slander, for charging the plaintiff with stealing *two beds*, it is not competent for the plaintiff, for the purpose of showing malice, to prove that the defendant subsequently entered a complaint against him before a magistrate, for stealing *a lot of wood and old iron*; first, because the words used in the complaint do not relate to the charge which is the subject of the action; and, secondly, because such using of the words is a proceeding in a course of justice, before a magistrate having jurisdiction of the supposed offence.

The defendant, in an action of slander, brought by husband and wife, for words spoken of the wife, cannot be allowed to prove, in mitigation of damages, that the plaintiff keeps a disorderly house.

It is not competent for the defendant, in an action of slander, with a view to show that the words were not spoken maliciously, to prove circumstances, which excited suspicion and furnished reasonable cause for belief, on his part, that the words spoken were true.

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### *Norfolk, October Term*, 1848.

*Edward Brinley and Another* v. *Samuel C. Mann.* It is no objection to the levy of an execution on real estate, that, after the seizure, the levy was suspended, until the estate had been levied on, in pursuance of a prior attachment; or that where an undivided part is levied on, the appraisers certified only the value of the whole.

An instrument, purporting to be the deed of the New England Silk Company, a corporation legally established, by Christopher Colt, Jr. their treasurer, — reciting that it is executed by him, in behalf of the company, and as their treasurer, duly authorized for that purpose, — and signed and sealed by him, with his own name and seal, followed by the words "treasurer of the New England Silk Company," — is not the deed of the corporation.

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### *Middlesex, October Term*, 1848.

*Alvin Raymond and wife* v. *Nathaniel Holden, Jr.* Where a husband made a conveyance of his wife's real estate, in fee, with the usual covenants of warranty, and the wife joined in the execution of the deed, "in token of her relinquishment of her right of dower in the premises," and the grantee and subsequent purchasers under him occupied the estate so conveyed, and exercised the ordinary acts of ownership upon it for more than twenty-nine years, without any claim or interruption on the part of the wife, or her heirs: — it was held, 1st, that these facts were not sufficient to authorize the presumption of a grant from the wife or her heirs; and, 2d, that her heirs were not thereby estopped to deny, that the title in fee was not in the husband, at the time of making such conveyance.

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## Recent English Decisions.

### *Court of Chancery.*

*Whittle* v. *Hanning*, April 14, and December 21, 1848, *Husband and Wife — Reversionary interest of wife.* A fund in court was held by trustees, in trust for the husband for life, and after his death for the wife for life, and after the death of the survivor, upon trust for their only son

absolutely. The husband and son executed a deed, assigning and surrendering their respective interests, in order that by merging the life interest of the wife in the immediate absolute interest of the son, and the life interest of the husband in the interest of the wife immediately expectant thereupon, the fund might become absolutely vested in the wife in possession. The husband and wife and son then presented a petition praying that the fund might be transferred to the son: — *Held*, dismissing the petition, that the interest of the wife still continued reversionary, and as such could not be disposed of by the husband and wife. In this case, *Creed* v. *Perry* (14 Sim. 592); *Wilson* v. *Oldham* (Ib. 594); *Hall* v. *Hugonin* (Ib. 595) were overruled. 12 Jur. 1079.

*South Eastern Railway Company* v. *Martin*, December 4, 1848. In this case the Lord Chancellor explained that in the case of *The Taff Railway Company* v. *Nixon* (1 H. L. Ca. 111,) their Lordships did not intend to intimate the opinion that accounts ought to be taken by a court of equity, if required by the parties, in all cases, in which a court of law might direct a reference at *Nisi Prius*. 13 Jur. 1.

*Rowland* v. *Morgan*, December 4, 1848. *Will — Construction — Heir-looms.* The Earl of A. bequeathed to his son and his heirs, Earls of A., certain chattels, consisting of plate, jewels, and other ornamented articles, to be held as heir-looms, and directed his executors to make an inventory of such chattels. By a codicil to his will, the testator declared it to be his will, that, in addition to the articles he had made heir-looms, certain other articles of the same description, deposited in a particular locality, should be considered as heir-looms, and he gave the same to his executors as heir-looms in his family, and directed them to make an inventory thereof. At the testator's death, his son succeeded to the earldom, and to certain estates annexed to the title, and strictly and inalienably settled in tail male. *Held*, that the case fell within the principle of the decisions, overruling Lord Hardwicke's judgment in *Gower* v. *Grosvenor* (3 Barn. 54; 5 Madd. 337) and *Trafford* v. *Trafford* (3 Atk. 347,) and that, consequently, the gift of the chattels was a gift executed, and that the chattels became the absolute property of the son on his father's death.

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## *Vice-Chancellor of England's Court.*

*Blagrove* v. *Hancock*, Nov. 17 and 20, 1848. A devise of real estate, after death of wife, to present and future grandchildren, as they respectively attained the age of twenty-five years, was held void for remoteness. 12 Jur. 1081.

*Thorneycroft* v. *Crockett*. If a mortgagee in possession works mines, he will be charged with his receipts, and not allowed his expenses. 12 Jur. 1079.

*Hawkins* v. *Hamilton*, Nov. 21, 1848. *Will — Survivorship — Period for Division — Per Stirpes.* A testator devised leasehold property to his son A.; but, in case A. died without issue, the leasehold property was to form part of his residuary estate, and to be divided amongst the children of

his three daughters, as thereinafter mentioned. He then gave the income of his residuary estate to his wife for life, and after her decease he directed his trustees to pay the income as follows: — "Amongst all my children, the said A. and my said three daughters, B., C., and D., or such of them as may be living at the time of the death of my said wife, in equal parts, shares and proportions, during their natural lives." "And from and after the decease of my said son and daughters, then I will and direct that the whole of such residue and remainder of my estate, with all accumulations thereon, shall be paid and divided amongst all and every the children of my said son and daughters, in equal shares; and in case any of my said son and daughters shall happen to die without leaving issue" the share of him, her, or them, to go and be divided among the survivor or survivors, and their issue, in equal proportions. B. died before the widow, leaving children. A., C., and D. survived her, and then D., and afterwards A. died; A. without leaving children, and D. leaving children. *Held*, that B.'s children were entitled to the same share as B. would have been entitled to had she survived the widow, viz., one-fourth; that upon A.'s death without issue, his share became divisible into thirds — one-third to B.'s children; one-third to D.'s children; one-third to C. for life-remainder to her children; — and that C. was only entitled for life to one-fourth of the "residue," and one-third of A.'s share. 13 Jur. 2.

*Stewart* v. *Forbes*, Dec. 11, 1848. *Consent — Decree — Repeal.* A decree declared that both parties consented that the court should decide without directing an issue. A petition was presented, stating that these words were inadvertently inserted, and praying that they might be stricken out, as the lord-chancellor declared that they precluded an appeal. *Held*, that such an alteration could not be made on petition, and that under the circumstances, the decree could not be altered. 12 Jur. 15.

*Countess of Rosslyn's Trust.* Nov. 23, 1848. *Accumulation.* Where a settler by deed directs an accumulation during the lives of two persons, the direction is valid during the settler's life. 13 Jur. 27.

*Cunningham* v. *Autrobus*, Dec. 20. *Reduction into possession.* A minor and her husband, on marriage, covenanted to assign to trustees two reversions, to which the wife was entitled. One reversion came into possession, and was, accordingly, transferred; the other remained outstanding. After the death of her husband, the wife presented a petition to have the sum transferred paid to her, and to have the settlement cancelled. *Held*, that the reversion was not bound by the settlement, but that the fund which had been transferred was bound. 13 Jur. 28.

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## *Vice-Chancellor Knight Bruce's Court.*

*Griggs* v. *Staples*, November 25, 1848. *Fraud — Marital Right — Setting aside deed — Costs.* An ignorant woman, possessed of money, lent part to a man having her confidence, and afterwards executed a deed prepared by the borrower's solicitor, by which the borrower covenanted to pay interest to her for her life, and to pay part of the capital to two of

his daughters, and the remainder to two of her relations. The woman soon afterwards married, and she and her husband filed a bill against the borrower to set aside the deed on the allegation that she executed it believing it to be a mortgage on the borrower's estate, and on the ground that the deed was a fraud on the marital right of the husband. The court, on the ground that the two cases made by the bill were not sustained, gave the plaintiffs leave to try an issue whether the deed was obtained by fraud; and, secondly, whether when she executed the deed, she was contracted to be married; and, thirdly, whether the plaintiff, the husband, knew of the settlement, when he married. And as the woman had not the protection of the borrower or his solicitor, to which she was entitled, not having the advice of her own solicitor, the bill was dismissed, without costs, if the plaintiff did not try the issue. 13 Jur. 29.

*His Royal Highness Prince Albert* v. *Strange — The Attorney General* v. *Lane*, January 16, 1849. *Right of Property — Descriptions — Catalogue — Injunction — Practice — Action.* The author and proprietor of an unpublished literary or artistical work is entitled to restrain parties, having unduly obtained a knowledge of the subjects of such work, from publishing without his consent, a catalogue enumerating, identifying, and commenting on those subjects.

The publication of a descriptive catalogue, made by the defendant without the knowledge of the Queen and Prince Albert (the means of making which were unduly obtained) of etchings executed by the queen and the royal consort, the produce of their combined labor, for their private use, and not published by them, is an interference with their property by the defendant.

Etchings so executed by them, they are entitled to retain in a state of privacy, and to withhold from publication; and such right of privacy is not lost by gifts of impressions to private friends, nor by placing the plates in a printer's hands; nor by the fact that impressions were taken without their consent, the plates being their undoubted property. The right of the queen and prince extends to the prevention of persons unduly obtaining a knowledge of the subjects of the etchings, from publishing, without their consent, a description, summary, or catalogue of them. 13 Jur. 44.

[This decision was fully sustained on appeal by the Lord Chancellor. See 13 Jur. 109.]

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## *Rolls Court.*

*Tulk* v. *Moxhay*, December 6, 1848. A. purchased a piece of pleasure-ground, in the centre of a square, in London, from B., and covenanted to use it only as a pleasure-ground. The pleasure-ground became subsequently vested, by purchase, in C. who made preparations for building upon it. The court, at the instance of B. enjoined C. from using the ground, otherwise than as a pleasure-ground, although it was alleged that the covenant did not at law run with the land. 13 Jur. 26.

## *Court of Queen's Bench — Hilary Term.*

*Foster* v. *Tattersall*, January 12, 1849. An affidavit of service of a writ made "*on Monday the 4th December instant*," is insufficient; and the defect cannot be cured by reference to the date of the *jurat*. 13 Jur. 32.

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## *Court of Common Pleas — Michaelmas Term*, 1848.

*Hopwood* v. *Whaley*, November 20, 1848. *Landlord and Tenant — Executor liable as Assignee of the Term — Value of Premises — Reading — Debt.* An executor, in whom a term of years has vested, the value of which is less than the rent reserved by the lessee, is liable, notwithstanding as assignee, for rent to the extent he might have let the premises for. In debt for rent due from defendant as assignee of premises demised for a term, at £90 a year, the defendant pleaded that he ought not to be charged with the rent except as executor of W. W. the lessee of the term; and that he (defendant) had not at any time since the death of W. W. received any benefit, as executor or otherwise from the demised premises, and that the premises, since the death of W. W. had yielded no profit whatever — that the term only vested in the defendant as executor, and that he had no assets to be administered. Replication, that defendant after his entry on premises, did receive great profit, *viz.* the rent sought to be recovered. Issue thereon. At the trial it was proved that the premises could have been let for £60 a year, and the jury found that the defendant by reasonable diligence might have made a profit for two years and three-quarters at £60 a year. *Held*, that the plea, to be good, must be understood to mean that defendant *could* not have received profit, &c., and that upon the finding of the jury, the verdict was rightly entered for the plaintiff. Verdict entered only for the rent at £60 per annum. *Remnant* v. *Bremridge* (8 Taunt. 191; 2 B. Moore, 94) overruled. 12 Jur. 1089.

*Leader et al.* v. *Purday*, December 5, 1848. *Copyright — Assignment — Notice of objections.* B. adapted an old melody to some words which he wrote, and got H., a friend of his, to compose an accompaniment, and thus to convert it into a song. B. sold the copyright to one of the plaintiffs under an agreement, by which he promised "to execute a proper assignment to such plaintiff, or his assigns, as he or they should direct." B. subsequently executed an assignment to both plaintiffs. The defendant published a colorable copy of the song; and, in an action against him for an infringement of the copyright, the jury found that there had been an infringement of the copyright. *Held*, that B. had a copyright in the entire piece — that under notice of the objections that the plaintiffs were not the owners of the copyright, it was not competent for the defendant to insist that the copyright in the accompaniment was in H., and that the plaintiffs should prove an assignment of the same from H., although the fact of H. having composed the accompaniment appeared from the plaintiff's evidence.

*Held*, also, that the sale and agreement by B. to *one* plaintiff only, operated as an agreement to execute an assignment, and did not render inoperative B.'s subsequent assignment to *both*. 12 Jur. 1091.

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### *Court of Exchequer — Hilary Term.*

*Cox* v. *Midland Counties Railway Company.* January 17. *Railway company — Contract — Officer — Negligence.* After a railway company was incorporated by act of parliament, an accident occurred to a passenger on the line in consequence of the negligence of a servant of the company: — *Held*, that neither the engine driver, the railway guard, nor the superintendent of traffic had implied authority to contract with medical men to assist the injured person.

But such an authority might be inferred from the conduct of the directors on former occasions, in recognizing similar contracts made by their officers; or perhaps from evidence that similar powers were usually exercised by similar agents of similar companies. 15 Jur. 64.

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## Notices of New Books.

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THE HISTORY AND LAW OF HABEAS CORPUS, WITH AN ESSAY ON THE LAW OF GRAND JURIES. By E. INGERSOLL, of the Philadelphia Bar. Philadelphia: 1849.

Mr. Ingersoll's history of the "great bulwark of English liberty," as it is sometimes called, exhibits great research, and contains a succinct account of this most efficacious process in support of private rights. The history begins with the Great Charter, and is illustrated by historical reminiscences, and by citations from the reports. In the present age, when no legal process is more venerated than this famous writ, it is common to regard only *its effect;* but Mr. Ingersoll's work, while it will interest antiquarians and scholars, will also assist those who may shelter themselves under its protection.

The Essay on Grand Juries is a compact historical account, which is both interesting and valuable.

A PRACTICAL TREATISE ON THE LAW OF SHERIFF AND CORONER, WITH FORMS AND REFERENCES TO THE STATUTES OF OHIO, INDIANA, AND KENTUCKY. By A. E. GWYNNE, Attorney at Law. Cincinnati: H. W. Derby & Co., Publishers. 1849.

Reports of Cases argued and determined in the Court of King's Bench, with tables of the names of the Cases and principal Matters. By Richard Vaughan Barnewall and Edward Hall Alderson, of the Inner Temple, Esquires, Barristers at Law. Vol. I. Containing the cases of Michaelmas, Hilary, Easter, and Trinity Terms, in the 58th year of Geo. III., 1817, 1818. New York: John S. Voorhies, Law Bookseller. 1849.

A Treatise on the Pleadings in Suits in the Court of Chancery by English Bill. By John Mitford, Esq. (The Late Lord Redesdale.) Comprising the notes of George Jeremy, Esq., of Lincoln's Inn, Barrister at Law, Charles Edwards, Esq., Counsellor at Law, New York, and a large body of additional notes, by Josiah W. Smith, B. C. L., of Lincoln's Inn, Barrister at Law, Editor of Fearne on Remainders, and author of a new treatise on Executory Interest. Sixth American, from the fifth London Edition, with copious American Notes, by Joseph W. Moulton, Esq., Counsellor at Law, New York. New York: John S. Voorhies, Law Bookseller and Publisher. Philadelphia: T. & J. W. Johnson. 1849.

A Practical Treatise on the Law of Replevin in the United States. With an Appendix of Forms and a Digest of Statutes. By P. Pemberton Morris. Philadelphia: James Kay, Jun. & Brother, 183½ Market Street, Law Booksellers and Publishers. 1849.

Our number was so nearly made up, when the above works were received, that we must defer any notices till next month.

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## Miscellaneous Intelligence.

Office of Attorney-General. — Of the thirty states, who find their representatives among the "stars and stripes," which are toasted every Fourth of July, twenty-six are provided with an attorney-general, among the officers who have their honor and safety in charge. No matter how they differ in other respects, whether whig or democrat, free or slave, economical or lavish, they all deem it wise and proper to have an officer bound in the law, to look after and care for the interests of the state in all matters involving the public peace, or the legal interests of the body politic.

Massachusetts is not one of these. She once had such an officer, and the framers of her constitution thought it would be an office which would be perpetual. But she has either grown too wise to need it, too economi-

cal to wish for it, or too poor to afford it. We have no doubt she is exceedingly wise. Of her economy, when we remember what enormous salaries she pays to some of her officers, we cannot say much. As for her poverty, though she has got a hard soil, we never exactly considered her as downright poor. A state with an aggregate of some four hundred millions of taxable property, and an annual income of more than a hundred millions of dollars, from her mechanical and manufacturing industry, must be able, one would think, to pay the salary of an attorney-general, especially if it were no higher than what was paid by her the last few years before she abolished the office. As for the necessity of having the services rendered which usually devolve upon such an officer, there can be no question; it grows out of the very circumstances, which a great community like a state must create for itself.

We must, therefore, if we would stand by our mother, the commonwealth, as we are always inclined to do, right or wrong, conclude that the abolishing of this office was a measure of wise economy. Acting upon this principle, we think there are three grounds upon which it can be sustained, and that is certainly as much as can be said for most acts of legislation.

In the first place, as the district attorney of Boston is not confined more than three hundred days in a year, in the fetid, pent-up air of the municipal court, throwing upon him a part of the duties of an attorney-general, is getting for the state a better pennyworth for the salary he receives, than if he only did what he is paid for. In the next place, it is a great deal better for the profession to distribute the other duties of that officer among several at "job prices," than to give a salary to one, and thereby exclude all the rest from sharing executive favors. And in the last place, it aids the state in selecting who shall be her chief magistrate, by limiting it almost necessarily to the legal profession. This is a view which commends itself to the profession with great force. We are not certain that it would not have been wiser to have had the constitution so framed as to require the governor to be a good lawyer. One difficulty might have been in deciding what constitutes a *good* lawyer, and another in convincing common men, such as merchants and doctors and farmers, that they could not be made into governors by the creative power of the people's omnipotence. But, after all, they could not get away from the fact that questions, and very puzzling questions too, are constantly arising in the administration of the government, which the executive must settle. If the governor happens to be a sound lawyer, he may guess out his way with a good degree of accuracy, and thus the people are often able to get just so much more than they bargained for, in a mere chief magistrate, as his law amounts to. But if they are perverse enough to prefer giving the title of "His Excellency" to a citizen who never read Blackstone, or made a justice's writ, one of three things must be the consequence,— either such questions must go unsettled, or the answer must be sponged out of some officer who has other work enough to do in executing his appropriate duties, or somebody must be appointed to do just what an attorney-general would, among other things, be required to do, and the only difference would be, he would not be called by that name.

This discussion has, however, led us aside from the purpose we had in view when we began this article. We had no idea the state would ever again think herself able to support such an officer, and were disposed to regard whatever related to that office in this commonwealth as among the forever past events which are to constitute her history. Our object, therefore, was to endeavor to "post up" this part of her judicial history, by recalling the names of those who have successively held the high and honorable place of crown officer under the province, and commonwealth's attorney under the constitution. Neither time nor space will admit of much beyond the mere catalogue of these names. The research will carry us back to a period when the men who held this office had few of the qualifications now deemed so essential to a performance of its duties — sound learning, and legal experience. There were next to none such in the land, and while clergymen, physicians, and military men held seats upon the bench of the highest court, it cannot surprise any one to find the place of attorney-general filled by a merchant, a physician, or an adventurer.

Most of our readers are aware that between the revocation of the colony charter and the organization of the courts under that of the province, there was an interval of some *seven* years, during which the administration of the government was, a part of the time, in the hands of a president, a part of it in a royal governor, and a part of it in a governor and representatives, chosen by the people. It was during this interval that the office of attorney-general was established. Including that period, there had been fourteen incumbents of that office before the American Revolution.[1] These were Benjamin Bullivant, George Farwell, James Graham, Anthony Checkley, Paul Dudley, Thomas Newton, John Overing, John Read, Addington Davenport, Jr., William Brattle, Jeremiah Gridley, James Otis, Edmund Trowbridge, and Jonathan Sewall.

Bullivant was a physician and apothecary in Boston, but took the oath of an attorney soon after his appointment as attorney-general, though he still continued his former business. He was a popular officer, distinguished for his wit, and a good speaker.

Farwell was one of the harpies that were brought into Massachusetts by Andros. He came from New York, and was probably educated as a lawyer. He is described by Randolph, who was himself one of the worst scourges that ever afflicted Massachusetts, as "Wort's creature, come with him from New York, and drives all before him." At the revolution, in 1689, he was seized and sent to England, and nothing more is known of him. He combined both the offices of attorney-general and clerk of the court, during a part of his administration.

Graham, his successor, also came from New York, and was, if possible, worse than Farwell. He seems to have been better educated, of more talents, but of quite as little principle. He was every way fitted to be a tool of Andros, and ready to carry out his systematic oppression of

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[1] For the facts in relation to this office, we are chiefly indebted to Washburn's Judicial History.

the people. He had not even a decent show of self-respect in the management of his office. He did not hesitate to tamper with juries to obtain verdicts, and in one instance on record, after a jury had been unable to agree during a whole night, he took the refractory juror aside and reprimanded him for his obstinacy, and, as a last resort, supplied the eleven with food and drink, while he attempted to starve the twelfth into submission.

At the Revolution he was imprisoned with Andros and sent to England, but afterwards returned to New York, where he was again in favor with the government, having been for several years speaker of the house of representatives of that province.

Checkley received his commission from Governor Phipps, in July, 1692, to act with the special court then constituted to try the witches, and afterwards, when the superior court was organized, became the first attorney general under the provincial charter. He was bred a merchant, was a captain of a company of militia, and was sworn as an attorney of the courts when he was fifty years old. He seems to have been in full practice in his profession, and was probably acceptable as a prosecuting officer, for he held the office till his death, in 1702, at the age of sixty-six.

Paul Dudley received his commission as attorney-general, directly from Queen Anne, in 1702, and held the office till his appointment to the bench of the superior court, in 1718. It would be exceedingly grateful, if within the purposes of this article, to trace the influence which is felt, to this day, upon the character and practice of the law, in Massachusetts, from the efforts of this distinguished jurist. He was the son of Governor Joseph Dudley, born in Roxbury, graduated at Cambridge, and studied law at the Temple. He was speaker of the house; member of the council; sixteen years attorney-general; seventeen years judge, and six years chief justice of the superior court, in all which offices he evinced talents and acquirements of the first order. He was, moreover, a learned naturalist, an able theologian, and a ripe scholar, and was honored by a membership of the Royal Society of London. He was the earliest of that constellation of names which shone so brightly at our ante-revolutionary bar, among whom were Read and Gridley and Thacker and Pratt, and lent it a lustre which it has never wholly lost. He died in 1751, at the age of seventy-five years.

Thomas Newton succeeded Mr. Dudley, and held the office at the time of his death, in 1721, when he was sixty-one years of age. He was born in England, was educated as a lawyer, and was, at one time, a deputy judge of admiralty. He held the office of comptroller of customs for the port of Boston, as well as that of attorney-general, at the time of his death.

The next in order was John Overing, who is represented as a successful lawyer, and an agreeable speaker, who exerted a commanding influence in the province. He came into the country with Governor Burnet, and died December, 1748. His successor was the distinguished John Read, who has been called "the greatest common lawyer that ever lived in New England." He was at first a clergyman, having been educated at Cambridge, and did not come to the bar till he was nearly forty years old. He

was the first of the profession who was ever chosen a member of the general court, having been elected from Boston in 1738. He was, withal, an author, and published a Latin grammar as early as 1736. He died in 1749, about sixty-nine years old.

Addington Davenport, Jr., was elected attorney-general by the house of representatives the year after Mr. Read's first election, but it is uncertain if he ever performed its duties. He was the son of judge Davenport, of the superior court, and after practising some years as an attorney, he went to England, where he took orders in church, and was successively rector of King's Chapel and Trinity Church in Boston, which latter place he held at the time of his death, in 1746.

William Brattle was attorney-general for two years, and was rather distinguished for the universality of his offices and employments, than the profundity of his learning, or the ability which he brought to them. He studied theology, and was a popular preacher. He studied medicine, and was a successful practitioner. He became a lawyer, and had an extensive business. He was a major-general of the militia and a leading politician. Unfortunately he lost the confidence of the whigs, and having joined the loyalists, was obliged to leave the country, and died at Halifax, in 1776.

Jeremiah Gridley held the office at two different periods. He, too, was educated to the ministry, and while engaged in teaching a school in Boston, was accustomed to preach. For a single year, he was the editor of a newspaper in Boston, after which he studied law, and, though destitute of the graces of eloquence, he became one of the most distinguished lawyers in the province. He argued the unpopular side of the question as to the legality of "writs of assistance" and thereby lost favor with the people. He resided in Brookline, and, with all his eminence and success in his profession, died poor.

James Otis, known as "Colonel Otis," as distinguished from his more eminent son, held the office of attorney-general for a single year. He belonged to Barnstable, and, though not liberally educated, became a leading and able lawyer. He was an influential politician, and, for two years, speaker of the house. He was disappointed in not being appointed to the bench of the supreme court, which had been promised to him by Governor Shirley, and became a most determined opposer of the administration. He was made chief justice of the court of common pleas, and judge of probate for the county of Barnstable, in 1764, and under Governor Hutchinson was a member of the council, after having been repeatedly rejected by Governor Bernard. He died in 1778.

Edmund Trowbridge was attorney-general from 1749 to 1767, when he was promoted to the bench of the superior court. He was born at Newton, in 1709, was graduated at Cambridge at the age of nineteen, and became one of the most profound and successful lawyers in Massachusetts. He resided at Cambridge, and died at the age of eighty-four, in 1793. Judge Putnam of the king's bench, in New Brunswick, Chief Justices Dana and Parsons, were among the many distinguished lawyers who shared in the advantages of his instruction. He lost his place upon the bench at the revolution, but he continued to pursue the study of the law, from the love he bore it, as long as he lived.

Jonathan Sewall was the last attorney-general under the old regime, and succeeded Trowbridge, when appointed to the superior court. He was graduated at Cambridge in 1748, and taught school, afterwards, for eight years. He studied law with Judge Russell, of the superior court, and commenced business in Charlestown. He was at that time a whig, and a bosom friend of John Adams, but it was thought to be so desirable to the government party to win him over, that the office of solicitor-general was created for him. He was, at the same time, advocate-general of the court of admiralty.

While attorney-general he was appointed a judge of admiralty for Nova Scotia, but never removed there to execute its duties. He was an able lawyer, and a distinguished political writer, had a great fund of wit, and was eminent as a scholar and a gentleman. He married a daughter of Edmund Quincy. In 1775, he left the country for England, and resided for some years near Bristol, and in 1788 returned to Halifax, where he died. One of his sons was the attorney-general, and the other chief justice of Canada.

This completes the list of attorney-generals who held office in Massachusetts, prior to the revolution. The space already occupied by this article prevents extending that list now to the time the office was abolished. If this were done, it would but strengthen the conviction that must have already been received from this brief notice, that it has been the policy of Massachusetts, until recently, from an early period, to secure for herself the services of high and able officers to take care of and represent her interests in judicial controversies. With the experience of near one hundred years to guide them, the framers of our constitution recognized the office as a proper one to be retained. So thought successive legislatures for sixty-three years under that constitution. The legislature of 1843 grew suddenly wiser and abolished it.

The present legislature have had the subject before them, and have decided the question both ways. Unfortunately, the last vote of that body left the matter where they found it, and the profession may still hope to see the favors of the government distributed among them in the form of liberal fees, if our good old commonwealth shall again "get into the law." We trust we know what is due to the great and general court. What they do we are aware, must be *per se* right. Like the king, they can do no wrong. And, certainly, so far as an attorney-general is concerned, the profession are the last who ought to complain of their action.[1]

Superior Court of the City of Boston. — The following is the bill which has passed the house of representatives for the organization of a new court.

§ 1. There shall be, and hereby is, established, in the city of Boston, a court to be called the superior court of the city of Boston; and there shall be appointed, commissioned, and qualified, in the manner prescribed

[1] Since the above was in type, we learn that the senate have reversed the action of the house, and reëstablished the office of attorney-general.

by the constitution, three meet persons, learned in the law, to be justices of the said court, one of whom shall be appointed and commissioned as chief justice of the said court.

§ 2. The clerk of the municipal court of the city of Boston shall perform the duties of a clerk of the said superior court at the terms thereof, held for the transaction of criminal business, and his duties, compensation, and tenure of office, as such clerk of the said superior court for criminal business, shall be the same as are now provided by law in respect to the said clerk of the said municipal court; and the said superior court shall have the same power to fill vacancies in the office of clerk of the said court for criminal business, and to appoint and qualify a clerk *pro tempore*, for such criminal business, as the said municipal court, or court of common pleas now have, and shall fix the compensation of such clerk, *pro tempore*, to be paid out of the fees received by the said clerk, or clerks, under this act; and the said clerk or clerks of the said superior court, for the criminal business thereof, shall be entitled to receive, for their services, the same fees which are now allowed by law to the clerk of the said municipal court, for similar services.

§ 3. The clerks, for the time being, of the supreme judicial court, in the county of Suffolk, shall also be the clerks of the said superior court, at the terms thereof, held for the transaction of civil business; and shall perform all the duties of clerk of the said superior court, in relation to the civil business thereof; and shall be entitled to receive, for their services, the same fees which are now allowed by law to the clerks of the supreme judicial court, and court of common pleas, for similar services in the county of Suffolk; and the said superior court shall have power to appoint and qualify a clerk *pro tempore*, for the civil business of the said court, who shall act as clerk of the said superior court, in the absence or inability of both of the said clerks of the supreme judicial court, and shall also have power to fix the compensation of such clerk, *pro tempore*, which shall be paid out of the fees received by the said clerks of the supreme judicial court, and the clerk of the criminal sessions, under this act.

§ 4. The said superior court shall have power to appoint two criers of the said court, one for the civil and one for the criminal side thereof, each of whom shall receive, for his attendance and services, the same fees as are now allowed by law to the crier of the supreme judicial court in the county of Suffolk; and they shall also have power to appoint a messenger or messengers of the said court; and the fees of such criers, and the compensation of such messenger or messengers, shall be paid by the city of Boston, in the manner hereinafter provided.

§ 5. The city council of the said city of Boston shall have power, and it shall be their duty, to provide, from time to time, by ordinance, for the payment, by the said city, of all expenses attending the sessions of the said court, and the transaction of its business, not herein specially provided for.

§ 6. The salaries established, and all expenses incurred in the administration of justice, under this act shall be paid by the city of Boston; provided, that the treasurer of the said city shall not be held to account to the commonwealth, for any fees, fines, forfeitures, or costs, accruing or

incurred in the court hereby established, or in the police or justice's court of the city of Boston.

§ 7. It shall be the duty of the city council of the said city of Boston to establish, by ordinance, the salaries of the justices of the said superior court, within sixty days after the passage of this act; but the same shall not become payable until this act shall have taken effect; but from and after the time when this act shall have taken effect, the said salaries, so established, shall be paid by the said city of Boston; and no salary shall be reduced, during the continuance in office of any of the said justices, to whom such salary shall be payable. And it shall also be the duty of the said city council, thirty days at least before this act shall take effect, to provide, by ordinance, for the payment, by the said city, of all the other expenses attending the sessions of the said court, or the transaction of its business, not herein otherwise established, so far as the same shall then have been ascertained, provided this act shall first have been accepted by the said city of Boston, in the manner hereinafter provided.

§ 8. The said superior court shall have exclusive, original jurisdiction of all suits in equity, to be commenced after this act has taken effect, of which the supreme judicial court, and the court of common pleas, within the county of Suffolk, now have, or of which either of them now has, original jurisdiction; but, any party aggrieved by any final decree of the said superior court, in any suit or proceeding in equity, may appeal therefrom to the supreme judicial court: *provided*, that such appeal shall be claimed within fifteen days from and after the entering of such final decree; unless the said superior court shall, for cause shown, allow a further time therefor. And if, upon such appeal, the supreme judicial court shall reverse the decree of the said superior court, the supreme judicial court shall enter such decree as the superior court ought to have entered; unless further proceedings in the cause should be necessary; in which case, the cause shall be remitted to the superior court for such further proceedings. And, whenever the decree of the superior court shall be confirmed by the supreme judicial court, the party appealing shall be decreed to pay, to the appellee, the costs, and all the reasonable expenses occasioned by such appeal, to be taxed by the clerk, and revised by the supreme judicial court, or some justice thereof, if either party shall so require. And no appeal shall be allowed, until the party appealing shall have recognized, with sufficient surety or sureties, to prosecute such appeal with effect, and to pay the costs and such reasonable expenses as he may be decreed to pay by the supreme judicial court.

§ 9. The said superior court shall also have exclusive, original jurisdiction of all real actions commenced after this act shall have taken effect, and of all civil actions commenced after this act shall have taken effect, of which any court of this commonwealth, in the county of Suffolk, now has jurisdiction, in which the debt or damages demanded, or the property claimed, shall exceed, in amount or value, the sum of three hundred dollars, and in which the plaintiff, or some one in his behalf, shall, before service of the writ, make oath, or affirmation, before some justice of the peace, that the matter, sought to be recovered, actually exceeds, in amount or value, the sum of three hundred dollars, a certificate of which oath or

affirmation, shall be endorsed on, or annexed to, the writ. And the said superior court shall also have exclusive jurisdiction of all appeals, to be claimed after this act has taken effect, from decrees of the judge of probate for the county of Suffolk, which are now by law cognizable by the supreme judicial court, with the like powers and authority now vested in the supreme judicial court, concerning such appeals. And they shall also have exclusive original jurisdiction of all petitions or complaints, for damages caused by the laying out, or discontinuance of highways in the city of Boston, which shall be instituted after this act has taken effect, of which the court of common pleas now has jurisdiction, with the like powers and authority now vested in the court of common pleas, concerning such petitions or complaints. And the said superior court shall also have power to grant writs of review of their own judgments, or of the judgments of the court of common pleas, within the county of Suffolk. The supreme judicial court, within the county of Suffolk, shall retain exclusive jurisdiction of all libels for divorce, and shall have the sole and exclusive power to issue writs of certiorari, mandamus, prohibition, and quo warranto; but the said superior court and the justices thereof, shall have concurrent authority, with the supreme judicial court in the county of Suffolk, and the justices thereof, to issue writs of habeas corpus, and to adopt all such measures, in regard thereto, as are provided in the one hundred and eleventh chapter of the revised statutes, or are otherwise provided by law.

§ 10. The said superior court shall also have exclusive original jurisdiction of all crimes, offences, and misdemeanors whatsoever, which are now cognizable by the supreme judicial court, within the county of Suffolk, or by the municipal court of the city of Boston; and they shall likewise have the same appellate jurisdiction which the municipal court of the city of Boston now has, of all offences which shall be tried and determined before the police court of the city of Boston, or before any justice of the peace for the county of Suffolk.

§ 11. Any party aggrieved by any opinion, direction, or judgment, of the said superior court, in matter of law, in any civil action, suit, or proceeding, whatever, not being a suit in equity, whether it be according to the course of the common law, or otherwise, shall have the same right to allege exceptions thereto, and to have the same allowed, as now exists in civil actions, suits, or proceedings, in the court of common pleas; and, thereupon, such exceptions having been allowed, the case shall be removed to, and entered at, the supreme judicial court, in the same manner, and shall be disposed of by the same proceedings, as are now required, or authorized, by law, in respect of cases carried, by exceptions from the court of common pleas, to the supreme judicial court; save in the case of probate appeals, in which the supreme judicial court shall either enter such decree as the probate court should have entered, or remit the case either to the probate court or the said superior court, with such directions for further proceedings as the case may require. And any party aggrieved by the final judgment or decision of the said superior court, founded on matter of law, apparent on the record, may appeal therefrom to the supreme judicial court, which appeal shall be claimed and entered, in like manner as similar appeals from judgments of the court of common

pleas are now required to be claimed and entered. And when any person convicted in the said superior court, shall think himself aggrieved by any opinion, direction, or judgment of the court, in any matter of law, he may allege exceptions thereto, in the same manner that a person convicted in the municipal court of the city of Boston, may now allege exceptions, and the case shall, thereupon, be removed to the supreme judicial court, and be there disposed of, as is now by law provided, in regard to cases removed by exceptions from the said municipal court, and, if such matter of law is apparent on the record, the party aggrieved may appeal, in like manner as is provided in this section, respecting civil actions.

§ 12. Final judgments in the said superior court, in civil actions, and in all criminal cases, may be reëxamined upon a writ of error, and reversed or affirmed in the supreme judicial court, for any error in law or in fact; and, when the judgment shall be reversed, the supreme judicial court shall render such judgment as the said superior court ought to have rendered.

§ 13. A majority of the justices of the said superior court may, at any time before judgment in any civil action, set aside the verdict, and order a new trial, for any cause for which, by law, a new trial may and ought to be granted, and they may also, at any time within one year after judgment in any criminal prosecution, grant a new trial for any cause for which, by law, a new trial may or ought to be granted, in the manner provided in the one hundred and thirty-eighth chapter of the Revised Statutes.

§ 14. The justices of the said superior court shall establish a seal for the said court, and all writs and processes, issuing from the said superior court, shall be under the seal of the court, and signed by the clerk thereof, and may run into any county, and shall be obeyed and executed throughout the state.

§ 15. The said court shall issue all writs and processes that may be necessary or proper to carry into effect the powers granted to them; and, when no form for any such writ or process is prescribed by statute, the court shall frame one, in conformity with the principles of law, and the usual course of proceedings, in the courts of this state.

§ 16. The said superior court shall be holden by one or more of the justices thereof, on the first Monday of every month, except the months of August and September, for the disposition of suits at law, and in equity; and, on the third Monday of each month, the said court shall be holden by one or more of the justices thereof, for the disposition of criminal business; but, upon the trial of any indictment for a capital offence, the said court shall be holden by all the justices thereof.

§ 17. The civil business of the said court shall be transacted exclusively at the terms thereof appointed for the disposition of civil business; and the criminal business of the said court shall be transacted exclusively at the terms appointed for the disposition of criminal business.

§ 18. Each term of the said court, for the transaction of civil business, may be continued and held until, and including, the last Saturday of the month in which the same commences; and each term of the said court, for the transaction of criminal business, may be continued and held until, and including, the Saturday preceding the first day of the next term.

§ 19. Once in every four months, grand jurors shall be selected, and

required to attend the said superior court, at the terms thereof for the transaction of criminal business, in the manner prescribed in the one hundred and thirty-sixth chapter of the Revised Statutes; and they shall be held to serve in the said superior court, at each term, holden for the transaction of criminal business, until another grand jury shall be empannelled in their stead.

§ 20. Traverse jurors shall also be selected and required to attend the said superior court, at the respective terms thereof, in the same manner in which traverse jurors are now by law selected and required to attend the terms of the supreme judicial court, in the county of Suffolk, and of the municipal court of the city of Boston.

§ 21. The judges of the said superior court shall have power, from time to time, to make any rules, not contrary to any statute of this Commonwealth, regulating the pleadings, practice, and business of the said court, both at law and in equity; and more especially they shall have power, and it shall be their duty, from time to time, to frame such rules as shall avoid all useless technicalities, and, at the same time, cause the points really in issue between the parties, to be distinctly and fully presented, on the part of the defendant as well as on the part of the plaintiff, so that surprise, loss of time, and useless expense, may be avoided, and trials shortened, and the just decision of causes expedited, as much as is practicable; and also such rules as shall cause the progress of all suits and proceedings in equity, to a just, final decree, to be as speedy as possible.

§ 22. At any term of the said superior court, for the transaction of civil business, whenever the public convenience shall require it, two sessions of the said court may be held in different places, each by one of the justices thereof: and such division may be made of the business of the court, at any time, as may conduce to the more speedy and convenient disposal of the same.

§ 23. When no justice of the said superior court is present at the time and place appointed for holding a court, whether at the beginning of a term, or at any adjournment thereof, the sheriff of the county of Suffolk, or either of his deputies, may adjourn the court, from day to day, or from time to time, as the circumstances may require, or as may be ordered by any of the said justices; and he shall give notice of such adjournment, by making public proclamation in the court house, and by a notification thereof, posted on the door of the court house, or published in some newspaper.

§ 24. All indictments, complaints, informations, appeals, and all other matters and things, which may be pending in the municipal court of the city of Boston, and all writs, warrants, recognizances, precepts, and processes, returnable to the said municipal court, and which would have had day therein, if this act had not been passed, shall, after this act shall take effect, be returnable to, and have day in, and be fully acted upon by, the said superior court, at the first term thereof, to be held for the transaction of criminal business, next after this act shall take effect. And all parties, jurors, witnesses, and others, who would have been held to appear at the said municipal court, then next to be held in the city of Boston, and after this act shall take effect, shall be held to appear at the next term of the

said superior court, for the transaction of criminal business; and, on the first day of the term last aforesaid, of the said superior court, the said municipal court of the city of Boston shall be, and the same hereby is, abolished.

§ 25. This act may be accepted by the said city of Boston, by the concurrent vote of the city councils of the said city of Boston, within sixty days after its passage; and it shall be the duty of the mayor of the said city, within ten days after such acceptance, to certify the same to the Secretary of the Commonwealth.

§ 26. This act, if accepted by the city of Boston, shall take effect, from and after the first day of October next; but the Governor, by and with the advice and consent of the council, may appoint the justices of the said superior court, at any time after the acceptance of this act, in the manner provided in the preceding section.

The New York Code of Procedure. — The legislature of New York has adjourned, and after much vacillation, has declared for the "Code." Its most persevering opponents admit that further resistance would be useless; and the new system of practice is now established as the settled policy of the state. The commission has been continued through this year, and, within that time, the Code will undoubtedly be presented in a complete state. Most of the amendments proposed by the commissioners to the act of last year, in respect to civil actions, have been passed. Some alterations were made by the legislature, which are considered unfortunate by the friends of the "Code." But these may at any time be corrected. Meanwhile, its great features remain unchanged.

We were somewhat misled by newspaper reports, in respect to the title and character of the bill introduced into the Senate of New York, by Mr. Fuller. The object of the Senate was to introduce into one act the original code, the amendments proposed by the commissioners, such amendments as they chose to make, and those parts of the third report which related to civil actions. To this bill, they gave this title, "An act to amend an act, entitled "An Act to simplify and abridge the practice, pleadings, and proceedings of the Courts of this State." The act so amended was the Code.

In our next number, we hope to have room to examine fully the last three reports of the New York Commission.

Law Reform in Missouri. — We have obtained an abstract of the act recently passed in Missouri, which it will be seen closely follows the New York statute.

*A Bill, to reform the Pleadings and Practice in Courts of Justice in Missouri.*

Whereas, it is expedient that the present forms of actions and pleadings, in cases at common law, should be abolished; that the distinction between legal and equitable remedies, should no longer exist; and that an uniform course of proceeding, in all cases, should be established; therefore,

Be it enacted by the General Assembly of the State of Missouri, as follows: —

Article 1. Of the form of civil actions.

The distinction between the different actions at law, and between actions at law, and suits in equity, and the forms of all such actions and suits heretofore existing, are abolished; and there shall be in this state, hereafter, but one form of action for the enforcement or protection of private rights, and the redress or prevention of private wrongs, which shall be denominated a civil action.

Article 2. Of the time of commencing civil actions.
" 3. Of the parties to civil actions.
" 4. In what county suits are to be brought.
" 5. Of the manner of commencing civil actions.
" 6. Of the pleadings in civil actions.
" 7. General rules of pleading.
" 8. Claim and delivery of personal property.
" 9. Injunctions.
" 10. Other provisional remedies.
" 11. Mistakes in pleading, amendments, and new trials.
" 12. Judgment upon failure to answer.
" 13. Issues in the mode of trial.
" 14. Trial by jury.
" 15. Trial by the court.
" 16. Trial by referees.
" 17. Judgment, and the manner of entering it.
" 18. The execution.
" 19. Appeals in civil actions.
" 20. Submitting a controversy without action.
" 21. Proceedings against joint debtors, and against heirs, devisees, legatees, and tenants holding under a judgment debtor.
" 22. Confession of judgment without action.
" 23. Offer of the defendant to compromise the whole, or a part of the action.
" 24. Admission, inspection, and production of writings, and examination of parties.
" 25. Examination of witnesses.
" 26. Motions and orders.
" 27. Entitling affidavits.
" 28. Computation of time.
" 29. Notices and filing, and service of papers.
" 30. General and miscellaneous provisions.

Legal Reform in Massachusetts. — We present below the report on this subject, in the house of representatives: —

The Committee on the Judiciary who were directed, by an order of the House to inquire whether any legislation is necessary to cause the administration of justice to be more speedy, cheap, and certain, than it is at present, have attended to that duty, and ask leave to report the accom-

panying resolves, and make a brief statement of some of the reasons for recommending the same:

The mover of the inquiry, (Mr. Curtis, of Boston,) whose character and experience make his opinions on this subject valuable, submitted, at the request of the committee, his views upon the necessity and character of the proposed reform. It is not proposed to disturb proceedings in criminal cases. All other proceedings in our courts, the committee are persuaded, may be so changed and amended as greatly to hasten the decision of causes, save time and expense to parties, and relieve judges, whose health and strength are at present too seriously tasked.

The systems of practice, both at common law and in equity, call for reform. In each case at common law, there may be said to be two principal stages, the preparation for trial and the trial itself. The first stage, as every one knows, has a very important influence on the second. If, before a trial is engaged in, the counsel who are to produce and examine the witnesses, the court who are to rule the law, and the jury who are to find the facts and apply the law, can have a clear view of the precise questions in controversy stated intelligibly in writing, there then need be no unnecessary labor done, or unnecessary expense incurred, in the trial. But if parties come before the court, as is now often the case, without any certain knowledge of what questions are to arise in the course of the trial, much time must be consumed in ascertaining the real points in dispute on which the merits of the case depend. Neither party, being able to foresee what will be admitted or denied by his adversary, must have his proof at hand on all possible points in the case. And when thus amply furnished with testimony, he will frequently find, after trial, that he has incurred much unnecessary expense. Such expense and trouble, however, must be incurred, or the party will be in danger of being without the necessary testimony, in which case, he must suffer for the want of it, or break off the trial and prepare anew. It also not unfrequently happens in trials, under our system of practice, from not having the real points of dispute previously ascertained and stated, that questions, seriously involving the merits of the case, do not present themselves to the minds of judge or counsel. In many cases it turns out that parties do not differ about the material facts, but the law of the case, and, there being no power in our practice to sift out the disputed points of a case before trial, much time of the court is consumed in the idle formality of producing and examining witnesses before the jury.

All systems of jurisprudence have rules intended to elicit and place upon record the real issues in each case, so that the parties may make only the necessary preparation to try them, the tribunal may readily discover what questions are to be tried, and the record may exhibit clearly what has been settled by the trial. Thus the common law contained a system known as special pleading.

Whatever may have been the merits of the system, it no longer exists, nor is it proposed to restore it. We still retain, however, the forms of actions which were the foundation of the science of pleading. Those forms appear to your committee to be now of little use; they are obstacles

in the way of useful reform. There are now seven forms of personal actions, of frequent use in this state, beside some others occasionally resorted to. They are assumpsit, covenant, debt, trespass, replevin, trespass on the case, and trover. Trover and assumpsit, though they come under the general head of trespass on the case, have peculiarities of their own. Each form of action is an appropriate remedy for some particular wrong; and, while the same strictness of rule was applied to both parties, the plaintiff, in setting forth his claim, and the defendant his defence, great certainty and precision were frequently attained.

But now, though the plaintiff is still held to the proper form in commencing his action, the defendant is absolved from all forms in answering to it, and the plaintiff is allowed, after he gets into court, to change his form of action, and the result is, that there is no way, in our practice, to put on record the questions of law or fact to be tried, nor of ascertaining what is to be tried, except by the developments of the trial itself, at the cost of much time and money, and not a few mistakes.

The expense and delay growing out of this state of things are very great. Persons not conversant with the practice of the law can hardly appreciate it. Every one can see, that, in a controversy of any sort, a great advance is made when the exact question has been found and stated. This is emphatically true in courts of justice. The committee would not say what proportion of the time of the courts is taken up in ascertaining the points in dispute between parties, but it is so large as obviously to add much to their labors, and to retard the progress of business. They are also persuaded that the business of the courts would be better done, and parties subjected to less expense, under a system of practice better adapted than the present to the wants of the suitor, the training of the bar, and the organization of the courts.

The pleadings and practice in equity seem to your committee to need reform more even than those of the common law. Some of the principles of equity jurisprudence, as they exist in England, have, from time to time, been engrafted on our system. This has been done cautiously, and by slow degrees, as the legislature became satisfied the good of the community required the change. With these principles were borrowed the forms and modes of proceeding by which those principles had been applied. The modes of proceeding in equity, in this state, by bill, answer, demurrer and plea, exceptions to pleadings, references to masters, &c., are substantially the same as in England. This system is of vast extent, refined and artificial in many of its rules, difficult of comprehension, and its records are very voluminous and expensive. This system, in order that it may be successfully administered, requires a court organized solely for that purpose, and constantly open. And your committee are not aware that this system is administered duly without great delays, by courts having infrequent terms, and organized to administer justice according to the course of the common law. The committee know that the subjects of equity suits are often of great extent, involving many parties and great interests, and that, from the nature of the jurisdiction, a final decree is not to be expected with as much promptness as is practicable in a court of common law; but they are clearly of opinion that the delays

in this commonwealth, in the administration of equity law, have been much enhanced by our system of pleadings and practice, — a system unsuited to the habits and training of the bar, and to the organization of the courts.

The subject that the house directed the committee to investigate is a very grave one. The committee have given it all the consideration that their other numerous duties would allow. In their opinion, the forms and modes of judicial proceeding in this state, need a thorough reform. It is obvious, however, that the contemplated reform cannot be properly considered and presented for the action of the legislature, by a committee of the same, and the committee propose a board of commissioners to perform that duty.

E. H. Kellogg,
P. C. Bacon,
Elisha H. Allen,
Wm. Brigham.

The following resolves were submitted with the report : —

*Resolved*, That the governor, by and with the consent of the council, be authorized to appoint three persons, who shall constitute a board of commissioners, whose duty it shall be to revise and reform the proceedings in the courts of justice in this commonwealth, except in criminal cases, and report the same to the legislature, subject to its adoption or modification.

*Resolved*, That the duties of the commissioners shall embrace the consideration and revision of the mode of bringing the parties before the court ; all their respective allegations ; the trial of questions of fact and of law; the summoning of witnesses; the question who may be witnesses; and who may be compelled to give testimony; the manner of their examination, and the competency of the same ; the judgment to be rendered, its execution, appeals, arbitrations, prerogative, and remedial writs ; and all processes against absent and insolvent debtors.

The Hymeneal Jail Delivery. — A bill is now pending before the House of Assembly at Albany, reported by Mr. Cornell, of New York, concerning divorces. In addition to the cases in which by existing laws the marriage contract may be dissolved, the bill makes five years insanity, two years imprisonment in the state prison, membership of a sect or order which disavows the marriage relation, grounds of emancipation from the ties of matrimony. When one reflects on the comprehensive definition which juries have given of insanity, the constantly multiplying statutes defining new penal offences, and the facility of getting up sects denying the policy of marriage, the bill may be considered as a pretty comprehensive amnesty, a general jail delivery for those under hymeneal bonds. Indeed, under the bill, love itself, which has been defined by a cockney to be "an insane desire to pay a young woman's board," would, if thus properly presented to a jury, compel them to grant a divorce.

Under the recent prize-fight bill, the gentle Rosalind might have been sent to state prison with consequent divorce, for putting her heart in the wrestling-match between her Orlando and the Duke's tall champion of the ring. And we venture to say that within a month after the passage of the

bill, some judicious speculator will get up a sect which shall "hold and teach that the marriage relation is sinful, and require the party to disavow the duties of such relation," and which will have more followers in a week, than Mahomet with all his houris gathered to his standard in a year. A monastic establishment, to which the mismatched might have recourse, would be as thronged as the temples of refuge in the ages of paganism. The success of the experiment which has united in a water-curacy the honors and profits of professional pursuits and hotel-keeping, will give some idea of the profitableness of such an institution, possessing the secret of the marriage solvent. It will not, however, be necessary, in this case, to call in the associative principle, except for the pleasure of it. In this country one man may be a sect — the come-outers are severally, as well as jointly, such — and the prisoner in wedlock has only to avow a religious conviction of the impropriety of marriage, to make good in due time, his right to divorce.



The question involves the most serious of social problems, and we do not whether Mr. Cornell has comprehended the full scope of this, his solution of it. It is due to him to say, however, that if his bill makes divorce as easy as "the utmost looseness," it gives a reasonable facility to new marriage. The defendant in a divorce case, who was once placed out of the ban of matrimony forever, can, under this bill, enter into a second marriage, (or third, fourth, or fifth, as the case may be,) after the moderate probation of three years. A strict mathematical calculation shows that within the term embraced between the ages of sixteen years and seventy, a man may be married and divorced nine times, allowing two years to state prison, three to subsequent probation, and one to domestic contentment for and with each of his spouses. By substituting for the two years in penal custody, five years in a lunatic asylum, or even in a private mad-house, with a pleasant keeper, and no straight-jacket, a person could go through with six wives, in the time aforesaid, and still, perhaps, like Oliver, want more. — *N. Y. Evening Post.*

Caveat Emptor. — In the October number of the Law Reporter, the writer of the article "*On the Warranty of Title in the Sale of Personal Property*" combated the proposition of Blackstone that every sale of a chattel implied a warranty of title. A distinguished lawyer of this Commonwealth has called our attention to a sentence on *p.* 281, in which it was stated that "the error (referred to above) once set afloat, has been adhered to, evidently without investigation, as a matter indisputable," and has referred us to an article (17 Am. Jurist, 94. *Tit. Caveat Emptor,*) in which the doctrine was denied in emphatic terms. The same article also contains the substance of the Roman law on this subject.

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Publisher's Note. — The present number of the Reporter, it will be seen, is enlarged by the insertion of an extra signature, making sixty pages in all, — it is the intention of the publishers to insert an additional signature in every other number, — thus making an average increase of six pages per month. They hope by this plan, to afford more room for the publication of recent interesting decisions, at length, without excluding the abstracts, and the miscellaneous legal intelligence of the month.

# Insolvents in Massachusetts.

| Name of Insolvent. | Residence. | Commencement of Proceedings. | Name of Commissioner. |
|---|---|---|---|
| Adams, James T. | Lowell, | Mar. 10, | Asa F. Lawrence. |
| Ames, Augustus C. | Salem, | " 24, | John G. King. |
| Ames, Pliny, | Becket, | " 23, | Thomas Robinson. |
| Arey, Elbridge G. | Barnstable, | " 28, | Zeno Scudder. |
| Avery, Lysander C. | Easthampton, | " 30, | Myron Lawrence. |
| Barber, Smith A. | Boston, | " 13, | J. M. Williams. |
| Barnes, Bradford, Jr. | Plymouth, | " 30, | Welcome Young. |
| Bigelow, Augustus C. | Acton, | " 19, | Asa F. Lawrence. |
| Blackmer, Luke H. | Enfield, | " 21, | Myron Lawrence. |
| Blake, Samuel, | Wrentham, | " 12, | Francis Hilliard. |
| Blanden, Leonard H. | Deerfield, | " 29, | D. W. Alvord. |
| Bowers, Darius, | Dracut, | " 6, | Asa F. Lawrence. |
| Bowman, Isaac C., et al. | Warwick, | " 1, | D. W. Alvord. |
| Breed, Daniel N. | Lynn, | " 15, | John G. King. |
| Brown, John H. | Randolph, | " 6, | Francis Hilliard. |
| Burnham, Jno., et al. | Kingston, | " 13, | Welcome Young. |
| Butler, Manly O. | Roxbury, | " 7, | Francis Hilliard. |
| Clark, John S. | Lynn, | " 21, | John G. King. |
| Clark, Julius L., et al. | Worcester, | " 16, | Henry Chapin. |
| Clough, Seth, | Chicopee, | " 6, | George B. Morris. |
| Colby, Josiah, | Roxbury, | " 2, | Francis Hilliard. |
| Cooley, William, | Boston, | " 29, | J. M. Williams. |
| Copp, Edward W. | Medford, | " 19, | Asa F. Lawrence. |
| Dale, John, | Rutland, | " 6, | Henry Chapin. |
| Damon, Ira B. T. | Cummington, | " 22, | Myron Lawrence. |
| Darling, Leonard, | Haverhill, | " 29, | John G. King. |
| Devines, William, | Springfield, | " 6, | George B. Morris. |
| Dexter, Anthony, | Seekonk, | " 20, | David Perkins. |
| Dickinson, Dexter O. | South Hadley, | " 1, | Myron Lawrence. |
| Dickson, Jno. P. | Salem, | " 28, | John G. King. |
| Felton, G. W., et al. | Salem, | " 15, | John G. King |
| Hastings, Jos. B. | Ashburnham, | " 5, | Henry Chapin. |
| Hill, John, | Boston, | " 16, | J. M. Williams. |
| Hitchcock, Miner, | Chicopee, | " 26, | George B. Morris. |
| Howard, Henry D., et al. | Sutton, | " 31, | Henry Chapin. |
| Hudson, George H. | Ware, | " 3, | Myron Lawrence. |
| Hurd, James, | Medway, | " 9, | Francis Hilliard. |
| Joy, Edward M. | Springfield, | " 3, | George B. Morris. |
| Keep, George, | Springfield, | " 14, | George B. Morris. |
| Kempton, Thomas D. | New Bedford, | " 13, | David Perkins. |
| Kendall, James, | Boston, | " 13, | J. M. Williams. |
| Lincoln, Jotham, et al. | Warwick, | " 1, | D. W. Alvord. |
| Lyman, Benjamin B. | Cummington, | " 17, | Myron Lawrence. |
| Mace, Joseph, et al. | Danvers, | " 20, | John G. King. |
| Marcy, Andrew A. | Millbury, | " 3, | Henry Chapin. |
| Maxfield, George, | Great Barrington, | " 20, | Thomas Robinson. |
| Mosely, Albert, | West Springfield, | " 2, | George B. Morris. |
| Nickerson, Silas, | Chatham, | " 8, | Zeno Scudder. |
| Olds, Levi, | Middlefield, | " 1, | Myron Lawrence. |
| Packard, Calvin, | Stoughton, | " 15, | Francis Hilliard. |
| Perry, John, Jr. | Boston, | " 10, | J. M. Williams. |
| Rogers, Hiram P. | Somerville, | " 23, | J. M. Williams. |
| Salisbury, Jotham, | Boston, | " 21, | J. M. Williams. |
| Shearer, Margaret, | Colerain, | " 17, | D. W. Alvord. |
| Shove, Stephen, | Fall River, | " 3, | David Perkins. |
| Stowe, Francis W. | Weston, | " 9, | Asa F. Lawrence. |
| Taylor, Daniel D. | New Marlboro', | " 3, | Thomas Robinson. |
| Thayer, Henry K. | Worcester, | " 31, | Henry Chapin. |
| Tilden, Oliver S. | Fitchburg, | " 28, | Henry Chapin. |
| Wheeler, Martin, | New Bedford, | " 19, | David Perkins. |
| Whitmore, A. D. | Great Barrington, | " 12, | Thomas Robinson. |
| Willis, Charles, | Chelsea, | " 15, | J. M. Williams. |
| Winslow, John B. | New Bedford, | " 20, | David Perkins. |
| Woodman, James, | Haverhill, | " 31, | John G. King. |
| Wormstead, Michael, | Newbury, | " 30, | John G. King. |